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THE
DECISIONS
OF THE
LORDS
OF

Council and Session,
In most Cases of Importance,

FOR
The Months of *November* and *December* 1714,
and *January*, *February*, *June* and *July* 1715.

WITH AN
Alphabetical Abridgment,
AND
The Acts of Sederunt
Made in that Time.

Observed by
Mr. ALEXANDER BRUCE Advocate.

By Order of the FACULTY.

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P U B L I S H E R
T O T H E
R E A D E R.

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question the Author's Veracity, he may have full Access, in the Space of a few Moments, and without any Expences, (except what his Liberality prompts him to, in Favours of the Under-keeper of the *Library*) to Cross-examine any of the following *Decisions*. Secondly, That if any Party, and chiefly our own Younger Brothers, incline to know what was at Large Pled in any of the following Causes, they may there find all the Arguments that were used on either Side, whether they influenced the Decision or not. Lastly, The Reader is Advertised, That altho' the *Faculty of Advocates* are alone at the Expence of this Work, (in paying to the Collector a competent Salary) yet they are willing the Benefit thereof be Communicate to the whole Nation. And for that End this Work will be continued from Year to Year; and about the Beginning of each Year, a Volume, consisting of much the same Number of Sheets with this, will be published: So that the Purchaser may either keep them by him stitched, or in Sheets, till they amount to a competent Thickness; or cause bind up every Year by it self, (each being to have its own *Indexes*) as he shall think fit.

T H E



T H E
DECISIONS
 OF THE
 Lords of Council and Session.

Beginning at November 1714.

D E C I S I O N I.

[9th November 1714.]

HALDEN of *LANERK*,

A G A I N S T

KER of *CAVERS*.



N a Competition for Mails and Duties of the Lands of *Middlemaswalls*, betwixt the said Parties, *Halden* Objected, That the Bond which was the Ground of *Cavers* his Adjudication, was Null, one of the Witnesses not being Designed, and not suppliable after the Act 1681, being Dated in Anno 1683.

Answered for *Cavers*, That the Witnesses being thus insert in the Bond, (*Gilbert Elliot* Inserter of the Sum, and *Archibald Melson* Servitor to the Laird of *Cavers*) and they both being Servants *Cavers* at the Time, they were sufficiently Designed, the above Denation being applicable to both; so that *Cavers* did not impugn the Act of Parliament, but only accommodate the Words specially insert to answer the Design of the Act, since there was really a Designation in the Writ. And this differs from Cases preceeding the Act, where, when there was no Designation at all, the Lords used to allow a Condescension and Proof: But here there is a Designation, and the Question only, How

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How it shall be applied? Neither is it incongruous, where Two are set down, to apply the *Predicate* (which here is the Word *Servitor*) tho' in the Singular, to both. 2do. The Letter (s) has only been an Omision; so that it is not so much the supplying of an omitted Condescension, as supplying the *Vitium Scriptoris*: Or not so much the condescending upon a Designation not to be found in the Writ, as helping a Literal Escape.

Replied for Lanerk, That in the above Clause *Archibald Nielson* is only designed, and *Gilb. Elliot* hath no Designation, for (Inserter of the Sum) designs no Person: And to apply the Words (*Servitor to the Laird of Cavers*) to *Gilb. Elliot*, is a plain Force, and may be used almost in every Case to elide the Act of Parliament. And as to the Application of a singular *Predicate* to plural Subjects, as that Way of Expression was rarely used, and only by *Poets* among the *Romans*, so it was never received in our Language; Nay, even in *Latin*, it was never used in expressing the Securities of Mens Rights, these not being to be shaken loose upon Grammatical or Rhetorical Turns, much less upon Poetical Flights of Expression. To the Second, *Replied*, That if *Vitium Scriptoris* could be held for an Excuse, it would go by much too far; for tho' it may be sometimes sustained, where, from other Clauses in the same Writ, it appears that the Error is merely an Escape in Writing, but substantially there is no Error; Yet 'tis not so here, where there is nothing in the Bond to perswade that *Gilb. Elliot* was *Cavers's* Servant; but rather the contrary: For if he was, the easy Designation had not been omitted. One Letter might perhaps have done it, without repeating the whole Designation, and yet it falls out in this Case, that a single Letter may have that Import as to make the Bond either stand or fall.

Dalserf for Lanerk. }
Alter Sir Wal. Pringle. }

The Lords found, That the Witnesses were not sufficiently designed; and therefore that the Bond was Null.

Gibson, Clerk.

DECISION II.

[10th November 1714.]

Sir Robert Forbes and his Factor,

AGAINST

George Watson Merchant in Edinburgh.

THE Deceast *Alexander Forbes*, having obtained a Bond from Lieutenant Colonel *Lumsden*, Major *Monro*, and some other Officers of Colonel *George Hamilton's* Regiment, for several small Sums, in Part Payment of what he had advanced for Cloathing the Regiment. Sir *Robert Forbes* who as Creditor to the said *Alexander*, had obtained a Gift of his Escheat, recovered Decrees of special Declarator against these Officers for their respective Debts, and having arrested their Arrears in the Hands of the Commissioners of the Equivalent; When he came to insist in a Furthcoming, an Interest was produced for *George Watson*, who

craved

craved to be preferred upon an Assignment from the principal Creditor : But Sir Robert's Arrestment being prior, he founds upon, and produces Letters of Intimation of his Assignment, and an Execution thereof at the Cross of Eainburgh, Pier and Shoar of Leith, bearing, That the Messengers made due and lawful Intimation to Colonel George Hamilton, Colonel of Her Majesty's Regiment of Foot Guards, and his Lieutenant Colonel, Major, Captains, and Subaltern Officers of the said Regiment, of the said Assignment; whereby he alledged the Original Creditor was denuded.

Against this Intimation, as being disconform to the Bond assigned, several Nullities were objected by Sir Robert, As 1mo. That the Bond referred to by the Intimation, is granted by the Officers of the Foot-guards; Whereas, the Obligants in the Bond assigned belonged to another Regiment. 2do. That the Intimation related to a Bond wherein Colonel Hamilton is bound; whereas he does not Subscribe the Bond founded on. 3tio. That all the Officers are mentioned bound in the Intimation; whereas Seven only Subscribe the Bond in Controversy. 4to. That the Sum due by the Subscribers, as mentioned in the Letters of Intimation, is greater than the Sum in the Bond Assigned. 5to. That the Designation of the Sum ought to have been in the Intimation, conform to each particular Officer's Debt, as mentioned in the Bond assigned. 6to. That the Execution of the Letters of Intimation, did not bear the Assignment to be produced.

Answered For Watson the Comperitor, To the First, That the Regiment is sufficiently designed by (Colonel George Hamilton) and if no more was necessary, *seperflua non nocent*, specially seeing there were not Two Colonels of that Name. To the Second and Third, It was Answered, That albeit the Intimation bears more Persons than are truly Signing, yet that also falls plainly under the abovementioned Brocard. Besides, That it was reasonable to mention the other Officers tho' not Signing: Because the Cloathing was for the whole Regiment, tho' there were but a Few that undertook Payment, by signing the Bond. To the Fourth, That the Difference is of no Import, because it was the Creditor's Purpose to have had as many Officers Subscribing, as would have extended to the Sum mentioned in the Intimation. To the Fifth, That the Date, Sum, and Creditor's Name, are specially exprest: Nay, the Onerous Cause of Contracting the Debt condescended on, whereby the Obligation was so specially designed, that no farder was needful. To the Sixth, It was Answered, That tho' Production of the Assignment be requisite in a Personal Intimation, yet when it is Edictal, the Warrant is not the Assignment: But Letters of Intimation under the Signer, which passing upon a Bill, the Assignment must necessarily be produced, when the Bill is past. So that the Letters supersede the Necessity of any farder Production of the Assignment.

The Lords Repelled the Five first Nullities; but as to the last, they fand the Execution of the Letters of Intimation Null; In regard the same did not bear Production of the Assignment.

Robertson, Clerk.

Sir Ja. Nasmyth }
for Watson, Alter }
Duncan Forbes. }

D E C I S I O N III.

[12th November 1714.]

The Creditors of *Hamilton Younger of Orbiston*,
A G A I N S T*Hamilton of Dalziel*, and the Creditors of *Orbiston Elder*.

A Disposition being granted in *Anno 1699*, by *William Hamilton* of *Orbiston*, in Favours of *James Hamilton* his Son, of his whole Lands; He also grants to him an Assignment of the same Date, to his whole Debts and Sums of Money, or other Rights, which was or could be Interpreted in his Favours: But reserving a Faculty to burden the Assignment with such Conditions as the Father should think fit. At granting these Rights, *Orbiston* stood bound as Cautioner for the Lord *Glasford* and his Lady, for a considerable Sum, to my Lady *Semple*, for which he had a Bond of Relief; and upon Distress having paid the Money, his Son's Creditors after his Decease, obtain'd themselves decerned Executors dative to him, and upon a License raised a Process against the Lord *Semple*; as also upon a *Cognitionis Causa*, Adjudged from *Orbiston Elder* this Debt of the Lord *Semples*. When *Orbiston* paid the Debt, he took an Assignment in his own Name, and thereupon Adjudged the Lord *Semple's* Estate, and his own Creditors also Adjudged from him: Whereby in the Ranking of the Creditors of the Father and Son, a Competition arose for the foresaid Subject of Relief.

The Point in Question being, Whether the general Disposition of all Debts by *Orbiston* to his Son, did Comprehend the said Bond of Relief? It was Contended for Old *Orbiston's* Creditors, That it did not. 1^{mo}. Because the said Assignment being General, could not be interpreted to include such singular Obligements, as Clauses of Relief, which by their Nature are scarce assignable, at least not to be presumed Conveyed under a Generality; specially since old *Orbiston* took thereafter Assignment in his own Name, and granted a special Assignment thereof to *Dalziel*. 2^{do}. Tho' the Assignment should be found to carry the Right of Relief, yet it's to be understood *cum suo onere*; so that young *Orbiston* behooved to free and relieve his Father of the Debt, which he did not. 3^{tio}. The Assignment being Latent, and Special, as to the Subject assigned, and not intimate to the Debtor and Old *Orbiston* having thereafter Adjudged, and this Adjudication Adjudged from him by his Creditors, and therefore legally intimate, they are preferable both to the Son and his Creditors. 4^{to}. The Son's Creditors cannot Compete, because the Assignment reserves a Faculty to burden the Assignment with such Conditions as the Father should think fit: Which Faculty he thereafter exercised in a posterior Contract betwixt him and his Son, with an express Irritancy, *de non Contrahendo Debitum*; and this Contract having intervened before Contracting any of the Son's Debts, they were thereby excluded from any Interest in the Subject.

Answered for the Creditors of young *Orbiston*, That the two above-mentioned Rights, Comprehending the whole Estate, must Comprehend this Bond of Relief; because nothing is excepted, especially since they are granted

granted with the burden of Debts; and seeing the Son was subjected to the Payment of this Debt to the Lord *Semple*, the Obligation of Relief was undoubtedly conveyed, with the rest of the Estate. 2do. Nothing hinders a Bond of Relief even before Distress to be assigned, since every Obligation may; and even such as are Conditional, as an Obligation of Relief is: So that the Cautioner being Distressed, his Assignee has the same Action, the Cedent would have had, as was found in the Case of the Marquis of *Tweeddale contra Earl of Lauderdale*. 3tio. As to *Orbiston's* taking Assignment to the Debt in his own Name, that was proper enough to shew the Distress was incurred, and the Right did accresce to Young *Orbiston*, like all other supervening Rights, taken by the Cedent, which doubtless Accresce to the Assignee. 4to. As to Old *Orbiston's* paying the Debt himself, and not the Son, that had only the Effect to purify the Bond of Relief, and make it take place in the Son's Person: Nay it's plain it was the Son's Means that paid it, the Father being Denuded, and so wanting Means of his own, which also *Answers* what was *Alleged* of the Son's being bound to Relieve the Father of the Debt, since that was Virtually an Obligation of Relief, that he undertook the Payment of the whole Debts. 5to. As to Old *Orbiston's* Creditors, their Denuding him by their Adjudication; It was *Answered*, That he was already Denuded by the general Assignment to his Son, to which the Adjudication led by the Father did Accresce, like an Assignee carrying on Diligence in his Cedent's Name. Besides that Young *Orbiston's* Right was first legally Perfected, by his Creditors pursuing the Lord *Semple* upon a Licence, which was Equivalent to an Intimation, which also takes off all Pretence of Latency. 6to. To the last Point, anent the innovating Contract, it was *Answered*, That the Son never receded from the first Settlement, nor was that Contract an Innovation, but a further Title given to the Son; and it was *jus tertii* to Old *Orbiston's* Creditors, since it does not State them in a better Case, there being nothing therein given to Old *Orbiston*, but only some Restrictions laid upon the Son, such as not to Contract Debt, which could signify nothing to Old *Orbiston's* Creditors: For tho' the Son's after Debts could not affect the Land; yet that would not extend to separate Funds, such as this Right of Relief, neither took that Contract any Effect, not being Registrate in the Record of Tailzies: So that the Son's Creditors were in *optima fide* to Contract.

The Lords found it Relevant to prefer the Son's Creditors, that the Debt was paid out of the Son's Estate and Effects.

Durie, Clerk.

Boswel for the Father's Creditors, *Alter* Sir Walt. Pringle.

DECISION IV.

Eodem Die.

Elizabeth Blair, Daughter of a first Marriage to **Blair of Auchinvole**,

AGAINST

Bethia Hamilton Relict of a second Marriage.

MR. William Blair of *Auchinvole*, having in a Post-Nuptial Contract, Provided the Heirs of his first Marriage in 18000 Merks; thereafter he enters into a second Contract with **Bethia Hamilton** his second

cond Wife (also after Marriage) whereby she is Provided in 5000 Merks in Liferent, and the Children of the Marriage in Fee. After his Decease, *Elizabeth Blair*, one of the Two Daughters of the first Marriage, Adjudges his Estate for 8000 Merks only remaining of the above 18000 Merks, and *Bethia Hamilton* the Relict also leads an Adjudication, for Implement of the Provisions in her Contract; and in the Ranking of his Creditors a Competition having arisen betwixt them, and the Relict's Oath having been taken, and she Owning that she had got some other Rights from her Husband *Stante Matrimonio* after the Contract of Marriage.

It was alledged for *Elizabeth Blair*, That these Rights ought to Impute in Satisfaction of her Claim *protanto, Quia Debitor non præsuntur Donare*. As was found in the Case of the Lord and Lady *Ormistoun, contra Hamilton of Bangour*, 16th November 1713. 2do. That the Relict's Adjudication was Null, being led against the Husband's Representatives for more, and in other Terms, than he was lyable, in so far as, by the Conception of her Contract, her Tocher could not be uplifted by the Husband without her Consent; only in Case it were uplifted, the Husband was bound to re-employ it in the same Terms; But *non Constat*, That the Money was uplifted, and not re-employed, and therefore the Lady could not adjudge without making this previously appear. 3tio. That the First Contract, tho' Post-Nuptial was not revockable: Not being of the Nature of a Donation, because the Husband and Father as such was obliged to provide his Relict and Children, the Provision being moderat, and efferring to the Tocher, as was found 25 July, 1710, *Jean Chalmers, contra Lyon of Banchry*.

Answered for the Relict to the First, That the Creditors might reduce these Rights, but could never impute in Payment of Sums. To the Second, That the Defunct had declared under his Hand, That he had received the Tocher; and accordingly many Years before his Death, delivered up the Securitys for it to *Orbistoun*, in whose Hands it was. To the Third, It was *Answered*, That by the first Contract of Marriage, the Defunct still continued Fiar of his own Fortune; and what he thereby got in Tocher was still obnoxious to his lawful Debts; as has been often found. As 21 November 1682. Children of Mr. *Andrew Majoribanks*, contra his Creditors. So that *Elizabeth Blair*, coming in but as an Heir of a Marriage, could not be preferred to the Relict, who is a just and Onerous Creditor for her own Portion: Provisions to a Wife being in the strictest Sense Onerous, but not so as to Children of a Marriage. And it's certain, that notwithstanding any Provisions in a prior Contract of Marriage, the Husband still remains *Dominus*, may contract Debts, Or enter into any Onerous Contract, Which may eventually render the Provisions ineffectual; and is of the Nature of a *Tacite Revocation*, the prior Children having only a Destination of Succession; and so can draw nothing till their Father's Debts and Onerous Deeds be satisfied.

The Lords found, that any Deed in the Relict's Favours, is imputable in Payment of the Debt she Adjudged for, unless she instruct a separate Onerous Cause, and Repelled the Alledgeance against her Adjudication.

Boswel for Hamilton. Alter, Alexander. }

cation, she instructing, the Tocher was uplifted by her Husband. And found the first Contract of Marriage, tho' after the Marriage, was not revocable, but that the Husband being Fiar, might do rational Deeds; and that the Liferent Provision in the second Contract of Marriage, was a rational Deed.

Durie, Clerk.

DECISION V.

Eodem Die.

Mr. Patrick Greenbill, and the other Creditors of Lyon of Banchrie,

AGAINST

Mr. Walter Stewart of Capeth.

David Lyon of Banchrie, having Married Jean Chalmers a Minor, she, by a Post-Nuptial Contract, Dispones to him and her self, and longest Liver of them Two in conjunct Fee and Liferent, and to the Bairns to be Procreate betwixt them, their Heirs and Assignies whatsoever in Fee, her Lands, &c. and he provides her in a Jointure. Upon his Breaking and Decease, his Creditors having affected the Lands, she raises Reduction of the foresaid Contract of Marriage, *ex capite Minor ennitatis* & *Lesionis*, before Diligence done by the Creditors; wherein she so far prevailed, that the Lords in July 1710, reduced the Contract, *quoad* the Liferent of her own Lands; but continued the Cause as to the Fee, till November thereafter.

The Relict being thereafter married to the said Mr. Walter Stewart, Dispones to him the saids Lands, with the Burden of her Liferent, and 100 *lib. Sterl.* to the Children of the first Marriage, whereupon Mr. Walter is Infeft.

The first Husband's Creditors having Adjudged these Lands, pursue Mails and Duties against Mr. Stewart and the Tenants; and he comparing, craves Preference and Absolvitor.

First, As his Wife's Assigney, he insists upon her former Reduction above-mentioned, and contended there was equal Reason to restore her to the Fee as to the Liferent, and that they could scarce be separate; neither in this Case could the Husband Lyon be *Auctor in rem suam*.

Answered for Lyon's Creditors, 1mo. That the Case of Contracts of Marriage was different from the Actings of Minors in other Cases: That as Minors might enter into Marriage State, so they might likewise Contract with respect to Settlements upon that Account; and if the Provisions were suitable and ordinary, there was no Ground of Restitution, and with respect to these, might Contract with the Husband, who was not therefore *Auctor in rem suam*, as in other Curatories. And there was no Difference whether the Contract was prior or posterior to the Marriage, being still in Contemplation thereof; and that here the Provisions were Rational and Considerable upon the Husband's Part. And in General, all this Transaction was no other than what Persons after Majority enter into. 2do. Without noticing whether the Contract was ra-

tional or not, the Alienation of the Property of Lands could not be legally done by any Minor unauthorized. 3th 10. The Provisions in this Contract in Favours of the Wife, were but imaginary, since the Event proved that *Lyon* had more Debt than Means: And such a Contract was lately Reduced by the Lords, 27th July 1708, *Anna Byers* contra *Alexander Reid* her Husband.

Replied for *Stewart*, That it did not well appear from the Tenor of the Clause, that the Fee was conveyed to the first Husband; and tho' *potior est Conditio Masculi*, yet it has been frequently decided, that Lands coming by the Wife, the Presumption runs in her Favours, where the Clause was any ways dubious. And the Disposition here runs in Favours of *David Lyon* her Husband and herself, and longest Liver of them in Liferent and conjunct Fee, and to the Bairns lawfully to be procreate betwixt them, their Heirs and Assignies in Fee. Where, 1st, She is joined with the Husband in conjunct Fee, and therefore the Lands being her own, the Presumption is for her. 2^{dly}, There is no Termination, failing Heirs of the Marriage, to the Husband's Heirs, which is the most usual Criterion, when the Fee is designed for the Husband.

Duplied for *Lyon's* Creditors, That the Heritage in Question being small, and partly Liferented, and disposed *Nomine dotis*, 'twas but a competent Tocher, and therefore the Fee presumed to be transmitted, as appears by the above-cited Clause in the Contract. And this 1st, *Quia potior est Conditio Masculi*. 2^{dly}, Where Lands are disposed in Contracts of Marriage *Nomine dotis*, the Fee passes to the Husband, as if the Tocher had been paid to him in Money; as was found 29th January 1639, *Gordon* contra *Park*; and 12th July 1671, *Gardner* contra *Sandilands*.

Altor Sir W^{al}. }
Pringle. Alter,
Graham. }

The Lords Found, That the first Husband was Fiar by the Conception of the first Contract of Marriage, but sustained the Reason of Minority and enorm Lesion; unless the first Husband's Creditors would offer to prove, that he had any Stock the Time of the Contract, for securing the Wife in a Liferent, tho' afterwards his Means failed.

Durie, Clerk.

DECISION VI.

[18th November 1714.]

Christopher Irvine and the Children of the deceast *Baillie Reid* in *Dumfries*,

AGAINST

The Children of Commissary Charters.

There being a Company of Merchants in *Dumfries* engaged in a Copartnery, there was borrow'd by Warrant from the Company 4000 Merks from the Countess of *Nithsdale*, and Six of the Partners granted Bond conjunctly and severally for the Sum, whereof *Irvine* of *Drumcoltrain* and the said *Baillie Reid* were Two. The Countess having assigned the Debt to Commissar *Alves*, these two, with the deceast Com-

Commisfar *Charters* another Copartner, who was also Factor for the others, borrowed 4400 Merks from Sir *David Cuningham*, which exactly answered to the Sum borrowed from the Countess, with the bygone Annualrents thereof, and they granted Bond for the same at *Dumfries*, and three Days thereafter the Money was paid to Commisfar *Alves*, and a Translation blank in the Assigney's Name by Mr. *Patrick Richardson* their Doer; which Translation was transmitted to Commisfar *Charters* in a Letter, but he dying some short Time thereafter, the Translation was found among his Papers blank.

Christopher Irvine, Assigney by *Drumcoltrain*, and Baillie *Reid's* Children, insist against Commisfar *Charters's* Children, for having it declared, That the Translation, tho' found blank, yet was for their Behoof for Two-third Shares, and that the Commisfar was only a *Custos*.

There being an Act before Answer allowed by the Ordinary in the Outer House, for proving the Qualifications condescended on by the Pursuers; and the said Mr. *Patrick Richardson* Deponing, That he received the Money from Sir *David Cuningham*, and applied it for Payment of Commisfar *Alves*, and thereupon obtained the blank Translation, for the common Behoof of the Obligants in Sir *David's* Bond, and that he sent the same with the other Papers thereto belonging to Mr. *Reid* or *Drumcoltrain*, under Coverture to Commisfar *Charters*. And Commisfar *Alves* having also Deponed, That the same was paid to him in ready Money, and the Translation therefore got, to the best of his Memory, by Mr. *Richardson*, as Trustee for the Persons bound in the original Bond; and that he had heard the said Money was borrowed from Sir *David Cuningham*, but knew it only by Hearsay.

It was alledged for the Pursuer, That the Money wherewith the Countess's Bond was purged, was by the joint Credit of *Drumcoltrain* and the Baillie and the Commisfar, and that the blank Translation was the Effect thereof; and that from the following Qualifications, 1mo. Because of the Date of the blank Translation at *Edinburgh*, being no more than three Days after the Date of the Bond to Sir *David* at *Dumfries*; so that they were upon the Matter to be reckoned of the same Date, and therefore very presumeable that the one was the Cause of the other. 2do. Because of the Agreement of the Sums. 3tio. From Mr. *Richardson's* Oath, wherein he was positive, that Sir *David's* Money was paid to Commisfar *Alves* by his Management. 4to. From Commisfar *Alves* his own Oath, where he says he had this by Hearsay. 5to. That the blank Translation came into Commisfar *Charters's* Custody, not by way of Appropriation to himself, but as a common Evident for the Behoof of the Three; and that from the following Circumstances. 1mo. It was necessary it should have been taken blank, because the Persons concerned were at a Distance, and had not determined in whose Name it was to be filled up; and had it been Commisfar *Charters's* by Appropriation, presumeable he had filled up his Name in it. 2do. This appeared from Mr. *Richardson's* Deposition abovementioned, which is not to be looked upon as a single Testimony; for besides that he was intrusted by all, he had the foregoing Circumstances, and the Nature of the Thing to bear Weight to his Deposition. For if it was the joint Bond of the Three, that procured the blank Write, Law presumes that it was transmitted as

a common Evident, the Persons themselves not being present, but acting by a common Agent. And this the *initium possessionis* being Documented, viz. the Manner how it came into Commissar Charters's Hands: Law and Reason presumes it remained such as he got it; for tho' a blank Write is presumed to belong to him who has it, yet if it be once Documented, that he came to it, *Non titulo Proprietatis, sive alienationis, sed titulo Depositarii*, Law will presume it remained in that Condition, unless it were proven, that Innovation was afterwards made.

Answered, for the Defenders to the First, That Commissar Alves his Oath is all upon Hear-say, and Richardson's is but a single Testimony. Besides that, whatever regard may be had to a Trustees Oath, when the Writes are in his own Hands, and while the Trust continueth, yet when it is over, the Affair is ended, and no more Regard to be given to his Oath, than that of any other Person.

Answered To the Second, That it cannot be imagined, That Men of Sense, and Reason, would trust an other with Securitys in Name of the Trustee, That may infer a considerable Debt against them and their Successors; that being like paying a Debt due by Bond, without getting it up, or a Discharge. 2do. The Translation being found blank, among Commissar Charters's Papers, presumes it is as fully his own, as if his Name had been filled up *ab initio* by the Laws at the Time: Nay, by it's being Blank, it's less capable of being proven to be in Trust, than if filled up *ab initio*; For suppose it delivered by Mr. Alves, for the Behoof of all Three, yet Law presumes it his proper Evident who has it, since such a Delivery was a Translation, which needed no further Solemnity. 3tio. Tho' it had been in Trust; yet when Commissar Charters came to compt with the other Two, and pay them their Shares, and so make the Translation truly his own, he needed no Write from them declaring it so, since his having the Write, made it fully his own.

The Lords Found, That the Blank Translation was Purchased with the Money of Drumcoltrain, Baillie Reid and Commissar Charters, Obligants in Sir David Cuninghams Bond. And Found it Instructed, That Mr. Patrick Richardson transmitted the said Blank Translation to Drumcoltrain, and Baillie Reid under Cover to Commissar Charters; and finding no Evidence, nor Documents that the Commissar did ever satisfy or pay the said Drumcoltrain or Baillie Reid, of their Shares in the said Countess's Bond, nor that he stated the same, or paid for the Co-partners in the Books of the Co-partnery, nor in any List of his own private Estate. They sustained the Qualifications founded on.

Alexander, Clerk.

Isa for Charters }
Alter Boswel.

DE

DECISION VII.

[19th November 1714.]

Sophia and Mary Shearers.

AGAINST

George Fleeming and Janet Ker his Spouse.

JAMES Hodge, having granted heretable Securitys, upon some Houses in Edinburgh, to some of his Creditors, to which his Wife expressly consented; after his Decease *George Fleeming* Marries the said Relict and Liferentrix, and enters to Possession by vertue of her Liferent-Infeftment; and further having applyed to the Dean of Gild for a Visite, he obtains from him a Report, That the Houses were become Ruinous, and in consequence thereof, a Warrant to Repair, and after Reparation, a Decreet of the Dean of Gild Court for the Expences, whereupon he Adjudgets. Thereafter the Pursuers *Shearers* raise a Procefs of Mails and Duties against him, and the other Possessors.

Alledged for Fleeming, 1mo. That he having entered to the Possession by vertue of his Wifes Liferent infeftment, was *bonæ fidei Possessor, qui facit fructus perceptos et Consumptos irrevocabiliter suos.*

Answered for the Pursuers, That his Wife having consented to their Right, they were preferable to him.

Replied, That however the Pursuers might be preferred to the Rents in Time coming; yet Absolvitor from Bygones, in respect of the Wifes Liferent Infeftment, and his *bona fides*, which could not be interrupted before Production of the Pursuer's Infeftment, to which the Wife is a Consenter. *2do. Et seperatim,* he ought to be preferred in timecoming by vertue of the Dean of Gild's Decreet and Adjudication thereon: Because the Subject was preserved by the foresaid Reparations.

Duplyed, That he knowing the Reparations were a priviledged Debt, to which all Creditors must yeild, was in *peffima fide* to impute his Intromissions to the Liferent Infeftment in the first place.

The Lords Found, That Mr. Fleeming's Intromissions are imputeable in Satisfaction and Payment of the Sums due for Reparations contain'd in the Dean of Gild's Decreet, and Adjudication following thereon

Gibson, Clerk.

Aetor *Spotiswood,*
Alter *Fleeming.*

DECISION VIII.

Eodem Die.

Fullarton of that Ilk, Adam Neil, and William Gemmil his Tenants,

AGAINST

The Earl of Kilmarnock, the Laird of Ochiltrey, and the Earl of Dundonald's Factor.

THE Earl of Kilmarnock and Laird of Ochiltrey, Two of the Justices for the Shire of Air, having Fined and Imprisoned the saids Two Tenants of Fullarton, upon a Complaint of John Hamilton Factor to the Earl of Dundonald, 21st. December last, (without allowing them either a Double of the Libel, or a Procurator to Plead for them)

them) for taking of Rabbits out of the Island, called, *The Lady-Isle*, by *Fullarton* or his Doer's Warrant, who stands Infeft and in Natural Possession of that Island. *Fullarton* and the saids Tenants, intent a Process for Damages, against the Justices and *John Hamilton*, wherein they insist on the following Heads of Injustice and Oppression. 1mo. That Two of the Justices of Peace could not Judge, Three being declared a *Quorum* by the Act Ch: II. Parl: 1. Sess: 1. Cap: 38. 2do. The Shire of *Air* being Divided into three Districts, *Kile*, *Carrick* and *Cunningham*. The Pursuers dwelt within the District of *Kile*, and were Cited to *Kilmarnock*, within the District of *Cunningham*. 3tio. The Justices could not sit and Determine Causes in the *Christenmas Vacance*. 4to. The Libel containing a Criminal Conclusion, the Defenders ought to have had a double of it. 5to. There was no Title to that Island produced for the Earl of *Dundonald* to found the Complaint. 6to. *Fullarton* the Possessor was not called, and tho' he had, yet being Minor, *non tenebatur placitare*. 7mo. The Defenders were refused the Priviledge to Compear by a Procurator. 8vo. They were Summarily Imprisoned, and there kept till a Suspension and Charge to set at Liberty.

Answered for the Justices, To the First, That by the *British Act*, the Justices are Declared to have the same Power here that they have in *England*, and Two make a *Quorum* there. To the Second, That the Division of the Shire into Districts, is only for the Conveniency of the Leidges; but the Jurisdiction of each extends over the whole Shire. To the Third, That the Justices sit at all Times, for preserving the Peace, and have their Quarter-Sessions in Time of Vacance, and the Act refers only to the Court of Session. To the Fourth, That it was needless to give the Defenders a Double of the Libel, since they were not insisted against for a Capital Punishment, but only for Damages and a Fine. To the Fifth, That now there's produced for the Earl of *Dundonald*, a Charter in *Anno 1636*. And therefore to the Sixth, That there was no necessity to call *Fullerton*, since the Earl was sole Proprietor, and the Defenders were Convened for a Riot, wherein all Parties Guilty are liable *in solidum* to the Penalties, without calling Authors or Warrantees. To the Seventh, That it was not Customary to allow Procurators to Plead, and there is an Act of the Quarter-Sessions prohibiting it. Besides, that the Defenders here Compeared, and Acknowledged the Offence, so that there was no occasion for a Procurator. To the Eighth, That it's Customary for Justices to Imprison Summarily, without a previous Charge for Penalties, otherways Penalties being commonly very small, they might be exhausted by discussing Suspensions that might be raised.

Replied for the Pursuers, That by the express Clause in the foresaid *British Act*, it is Provided, (That the Methods of Trial and Judgment, shall be according to the Laws and Customs of Scotland) and the *Quorum* that makes the Session, is an Essential Part of that Method. 2do. The Division of the Shire into Districts, is rather for the ease of the Leidges. 3tio. Tho' Quarter Sessions do hold in Time of other Vacations, yet that Custom cannot Derogate from this Statute, which Discharges any judicial Proceedings in *Christenmas Vacance* (notwithstanding of any Custom in the contrary) and this not only with respect to the Session, but all other Inferior Courts of Justice within Scotland. 4to. In all Criminal Cases, tho' not

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not *Capital*, the Defender ought to have a Double of the Libel with the Citation, at least a competent Time allowed him to Answer. 5^{to}. Tho' now there be a Charter thrown in, yet that could be no Foundation for the Process before the Justices, it not being then produced. 6^{to}. The refusing to allow a Procurator to Compear for the Defenders, was manifest Oppression, contrary to the expresse Acts of Parliament, as Ja. I. *Parl.* 2. *Cap.* 45. Ja. VI. *Parl.* 11. *Cap.* 90. and to the Disposition of the *Common Law*, L. 1. § 4. ff. *de postul.* 7^{mo}. The Fine, according to Law, for the first Fault, could be only one 10 Pound, Ja. VI. *Parl.* 6. *Cap.* 84. whereas here they are fined in 10 Pound to *John Hamllton*, and as much each to the Fiscal. 8^{vo}. The summar Imprisonment without a previous Charge, is contrary to the Liberty of the Subject, and to expresse Law, Ch. II. *Parl.* 1. *Sess.* 1. *Cap.* 38. which provides, That the Lords shall direct Letters of Horning on 15 Days for all Fines imposed by the Justices; and the contrary Practice being unwarrantable, cannot excuse the Breach of a plain Law.

The Lords Found, That Three, and not Two, of the Justices of Peace are a sufficient Quorum; and found the Justices might proceed, tho' either Pursuer or Defender live in distinct Districts of the same Shire; and that there being no Violence alledged, the Justices ought not to have holden a Court in Christenmas Vacance: But found, That these Errors are no Foundation for Damages. And repelled the Alledgance, That the Earl of Dundonald's Title was not Libelled, and found his Possession ought to have been proven. And found the Pursuers ought to have had a competent Time to Answer, according as the Exigence of the Matter required, and Allowance of a Procurator to compear: And found the Justices may summarly imprison when the Cause requires, till Payment of the Fine; but that in this Case there was no just Cause either for Fining or Imprisoning. Vide more of this, 19th February 1716. Durie, Clerk.

Astor M^r Doual. }
Alter Nasmyth. }

DECISION IX.

[22d November 1714.]

Creditors of *Rosehill*,

AGAINST

Creditors of the deceast Mr. *William Thomson*.

MR. *William Moir* having raised Summons upon the passive Titles, against *John Ross* of *Rosehill*, as Representing his Father, Dated the 8th, and Signet the 9th of *May* 1693, and (before executing thereof) raised also Letters of Inhibition, containing Arrestment, Dated the 11th, and Signet the 12th of the said Month and Year foresaid; Mr. *Moir* assigned the Debt and Diligence to Mr. *William Thomson* Writer to the Signet, who obtained Decreet in Absence against *John Ross*, and then

then Adjudges : This having occasioned a Competition betwixt his Creditors and the other Creditors of *Rosehill*, Mr. *Thomson's* Creditors crave Preference upon the said Inhibition, as being prior to the contracting of the other's Debts.

Answered for the Creditors of *Rosehill*, That the Inhibition was Null, as proceeding upon a false Narrative (*viz. As the said Summons and Action duly execute, shown to the Lords, has testified,*) in so far as there was no Summons execute, and consequently no depending Process the Time of raising the Letters of Inhibition. 2^{do}. A Decision was alledged in a parallel Case, 19th July 1706, where, in a Competition of the Creditors of *Strichen*, the Lords found, That a Libelled and Signeted Summons, before it was Execute, did not make a Depending Action; and therefore did not sustain Arrestments raised and execute upon the Summons on the passive Titles against *Strichen's* Children.

Replied for *Thomson's* Creditors, That whatever of Old has been the Practice, yet for a long Time it had been Customary to raise General Letters of Inhibition and Arrestment in the Way now quarrelled; by which Custom, the Lieges are made to believe they act warrantably : So that here (if in any Matter of Form) the Brocard should hold, *Communis Error Jus facit, & Consuetudo optima Legum interpret.* 2^{do}. A plain Inconveniency would otherwise follow with respect to Persons at a Distance, where the execute Summons must be returned before the Letters of Inhibition can be taken out; nay without this, the very executing of a Summons were the Mean to put the Debtor upon Ways to Elude it. 3^{tio}. In *Strichen's* Case, some of the Arrestments were laid on prior to the Execution of the Summons.

Duplied for *Rosehill's* Creditors, That no Custom could introduce an Abuse, or authorize a Practice contrary to Law : That it was Law and Stile formerly, and the common Stile to this Hour, cannot be controverted; and if the Lords had designed otherwise, they would have allowed the Writers to the Signet to have altered their Stiles in the Case of Inhibitions on depending Processes : But the continuing the Stile makes the Executing still essentially requisite, previous to the raising the Letters of Inhibition : And what was Law formerly must still continue, unless Repealed. 2^{do}. Common Bills whereupon Letters are directed, do pass of Course *periculo petentis*; and if they proceed upon a wrong Narrative, the Will of the Letters can take no Effect, as proceeding upon *Obreption*. 3^{tio}. The Argument from the Inconveniency, is of no Force, as proceeding *ab incommodo*, which can never authorize a Practice contrary to Sense, Law, and Stile. 4^{tio}. As to the above-cited Decision, the above Alledgance did no way influence it : For, the sole *Ratio decidendi* was, That a Libelled and Signeted Summons did not make a depending Action.

Astor Horn. Alt. ?
Sir Walter Pringle. }

The Lords sustained the Nullity objected against the Inhibition, as proceeding without a Warrant; the Summons whereupon it is founded, not being Execute the Time of raising the Inhibition.

Sir Ja. Justice, Clerk.

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D E C I S I O N X.

[25th November 1714.]

James Bruce of Powfouls.

A G A I N S T

Rashiehill and Others.

BY Charter under the Great Seal in the Year 1612, in Favours of Powfouls Predecessor, after Enumeration of the Lands formerly belonging to the Family, proceeding upon the Father's Resignation, the King grants a *Novo Damus*, in which there is this Clause, *Una cum Terris vulgo* (The haill Sea Greens) *communibus Viis, & Passagiis totarum & integrarum predictarum Terrarum respective, usitatis & consuetis*. And all, with the former Lands, are erected into a New Barony, called, The Barony of Powfouls. These Sea Greens are for the most Part every Tide, and in Spring and High Tides, entirely overflown.

By Vertue of the above Clause, Powfouls claims Property in all the Sea Greens that Front upon his own Lands, from one Point to the other; but Rashiehill and the other Neighbouring Heritors contending, That these of the Sea Greens, which ly betwixt their respective Lands and the Sea, are a Part and Pertinent thereof, and founding also upon Immemorial Possession.

It was *Alledged* for the Pursuer, That these Sea Greens were a Part of *Litus Maris*, which is defined to be, *Quatenus Hibernus Fluctus maximus excurrit*; and therefore by the *Common Law*, counted *Inter Res Communes*; but by the *Feudal Custom*, *Inter Regalia*: For *Qua nullius sunt, sunt Domini Regis*. So that they cannot be claimed by any, as Part and Pertinent of their Lands, and accordingly here the King makes them over, not as the rest of the Lands, upon Resignation, but by a new Grant. 2^{do}. A special Charter is preferable to indefinite ones, which have only the Claim of Part and Pertinent. And hence the Lords preferred the Proprietar of Tillicutry, in a Debate of controverted Lands with Murray of Abercairny, where Abercairny's Proof of Possession, as Part and Pertinent, was very pregnant.

Answered for the Defenders, That if the Civil Law be taken as the Rule here, then *Litora Maris* by that Law are *inter Res nullius*, and therefore the Dominion of them is not communicable to any private Party: And tho' it were granted that our Kings had the Dominion of the Seas, yet it is very absurd to say they could alienate the same, since publick Use and Policy require that this Dominion continue inseparable from the Crown. 2^{do}. The above Feudal Maxim, only takes Place in such Things as are Caducuary or Dereliquish'd, or come any Way to want an Owner, and yet truly are the Subject matter of Property, & *in Commercio*; but it cannot be applied to *Res Nullius*, and which by their Nature cannot be appropriate. 3^{tio}. Our Feudal Customs have intirely receded from that Principle of the Common Law, it being plain, that they whose Lands Front upon the Sea, do Fence and Inclose far within where the *Fluctus Hibernus* reaches, and use the same as their Property; yea they have Power to gain upon the Sea. 4^{to}. By our Custom, *Litus Maris* is only the Sand where the Sea ordinarily flows; For the Definition in the Roman Law took its Rise from this, That upon the Coasts of Italy, the

Rising and Falling of the Tides did not by very far vary so much as with us; otherwise Reason would never have allow'd them to reckon so much more Ground *Juris Communis*, than can be thought necessary for publick Use.

Answered also *separatim* for the Defenders, That by the Words of the Charter these *Sea Greens* are not disposed as a separate Tenement, since if the Words (*Sea Greens*) be so taken, 'tis scarce good Sense; specially since they are limited by the following Words, *Usitatis & Consuetis*; whereby, these *Sea Greens* are only thrown in among the other Pertinents of the Lands disposed, and are expressly called the *Sea Greens*, (*Predictarum Terrarum*;) limited by the Words, *Usitatis & Consuetis*; therefore the Probation of Possession must regulate the Matter.

Replied for the Pursuer, That this Interpretation cannot be admitted, *imo*. Because, if it had not been the giving a new Right, it had been brought in to the former Part of the Charter, upon the Resignation of the Proprietary; whereas the *Sea Greens* are not mentioned in all the former Part. *2do*. They are first brought in, in the Clause of *Novo Damus*, and that as a distinct Right; for the other Lands are repeated, and closed with the usual Stile, *Cum Partibus, Pendiculis annexis & Pertinent*: And then follows a new Grant, as of a distinct Tenement, *Una cum Terris, vulgo, The Sea Greens*. *3tio*. The Words, *Usitatis & Consuetis*, are only applicable to *Communibus Viis & Passagiis*, immediately preceeding; for it is Incongruous to apply Use and Wont to Property, it being only applicable to *Servitudes*; nor did ever any Stile dispose Lands *Used and Wont*. And the very Designation of the *Haill Sea Greens*, rejects a Restriction; for otherwise it had been, *The Sea Greens, as in Use to be possess'd*. *2do*. Nothing can be more *Usitatum & Consuetum*, than that he should have the *Sea Greens* adjacent, to his own Barony. Specially, *3tio*. Since most of the Defender's Lands ly Discontiguous from the *Sea Greens* they possess.

Duplied for the Defenders, *imo*. That general Words, such as *Usitatis & Consuetis*, in the End of a Sentence, affect all that went before: Otherwise, *2do*. These Words had likewise been adjected before the Words, *Haill Sea Greens*; it being ordinary in *Charters* to adject these Words to the End of the Clause. *3tio*. The Words, *Communibus viis & Passagiis*, relate to the whole Lands, as well as to the *Sea Greens*; otherwise the common Passages of the other Lands are not disposed, which are never omitted: How then can it be thought, that the *haill Sea Greens*, (a separate Tenement, as the Pursuer pleads) would have been thrown in the Midst of the Pertinents of the other Lands, and separate the one Half of them from the other? *4to*. *Usitatum Consuetum*, is *Facti*: Nor is it to be enquired what might have been proper and expedient for *Powfouls* to have, but what Use and Wont has given him. *5to*. Discontiguity excludes not Part and Pertinent.

Altor Sir Wal.
Pringle. Alter
Ro. Dundass. }

The Lords Found the *Sea Greens* are not inter Regalia, and that they were not Established as a separate Feu, or Right, from the Lands formerly belonging to the Obtainer of the Charter 1612; but that *Sea Greens* may belong to the Neighbouring Heritors, as Part and Pertinent of their Lands.

Mackenzie, Clerk.

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DECISION XI.

[1st December 1714.]

The Relict and Children of *James Smith*,

AGAINST

The Earl of *Winton*.

THE said *James Smith* having served the late Earl of *Winton* for many Years, in Quality of Factor or Chamberlain; the present Earl being beyond Seas when his Father and Brother died, and not having even then returned, it was concerted at a Meeting of some of his Lordship's Friends, That *Seton of Tough*, and upon his declining the Office, Sir *Walter Seton*, one of their Number, should go Abroad in Quest of the Earl, in order to inform him of the State of his Affairs, and to acquaint him, That there was an absolute Necessity of his Lordship's Presence to Manage his own Business. At which Sederunt, they also resolved Sir *Walter* should have 100 *Lib. Sterling* for defraying the Charge of his Journey, out of the first and readiest of the Rent of the Earl's Estate. After *James Smith's* Decease, his Children, as having Right by a general Disposition, pursue the Earl for Payment of the 100 *Lib. Sterling*, and Annualrents thereof, advanced by the Bailie, in Manner and for the End foresaid.

Answered for the Earl, That Sir *Walter* had no Mandat from his Lordship, nor was he under any Character that could found such a Repayment. 2do. A *Negotiorum gestio* must be necessarily and profitably done, otherwise the Negotiator hath his Labour for his Pains, and he that set him on Work must pay him his Expences. And if a Man undertake what is *Insolitum* or unusual, he runs the Risque thereof himself, if it miscarry; Negotiations of this Nature requiring the most exact Diligence that can be proposed: So that if Sir *Walter* had no other Errand but to give an Account how Matters stood, this might have been done to as good Purpose by a Letter.

Replied for the Defenders, That they did not Contend there was any express Mandat, but a *Negotium utiliter gestum* for the Earl, and that not undertaken by Bailie *Smith* at Random, but with Concourse of the Friends of the Family. And therefore, (in Answer to the 2d.) this advance of Money was both necessary and profitable, as well in the Effect as in the Design; the Design having been to give his Lordship a particular Account of his Circumstances, and to sollicite his Home-coming. And the Effect, (tho' it did not immediately follow, yet) that the Friends, by Sir *Walter's* Journey, got Knowledge where his Lordship was, so as to communicate with him by Letters, and send him Bills, which effectuated his Return. And as to this *Negotium*, its being *Insolitum*, Answered, That when a Person Absent falls to a considerable Heritage, and it not being known where he is, and he keeping no Correspondence, his Affairs going to Confusion, without Orders, that those interested should take rational Methods to prevent these Inconveniencies, which may turn to the Ruin of the Absent's Affairs, is not at all *Negotium insolitum*, tho' it may rarely fall out; but it is a necessary Procedure,

ture, when fallen out, for the right Administration: For *Insolitum* is not what rarely falls out, but the undertaking of a new sort of Business, not in the Way of usual Administration.

Actor Falconer. }
Alter Horn. }

The Lords Found the Earl liable to Refound the 100 Lib. Sterling, Advanced by Baillie Smith to Sir Walter Seton.

Gibson, Clerk.

DECISION XII.

[2d December, 1714.]

David Jackson Merchant in Perth,

AGAINST

The Relict and Children of John Monro, &c.

THE said Jackson, Monro, and others in Company, having sold a Part of a Loading of Timber to the Lord Nairn's Wright, for his Lordship's Use; the Wright draws a Bill upon my Lord for the Price, payable to Jackson, or Order; which his Lordship accepts. The Bill being Indorsed to James Richardson Sheriff-Clerk of Perth, as Trustee for the Behoof of the Company, some Creditors of one of them Arrested in the Trustee's Hands; whereupon he delivered back the Bill to the Company, and took them obliged to warrant him against the Effect of these Arrestments. The Company then delivered the Bill to Monro, with a Discharge thereof apart; whereupon the Lord Nairn pays the Bill, and gets up his Discharge.

Monro dying before Clearance, the rest of the Company who had not got their full Shares of the Lord Nairn's Money, insist for the same against his Children; where it was Answered for them, That the Question resolved in a Trust, which was not probable after Monro's Death otherwise than by Writ, the alledged Trust being since the Act 1696.

Replied for the Pursuers, That the present Case fell not under that Act, but under the Exception thereof; which provides, That it should not extend to Indorsations of Bills of Exchange, nor to Notes of any Trading Company. And the Reason of the Exception is plain; for if Trust were not allow'd amongst Traders in Bills of Exchange, it would interrupt Commerce.

Duplied for the Defenders, That the Exception in that Act cannot rule this Case, because that Exception relates only to Indorsations of Bills of Exchange; but here the Question is not about an Indorsed Bill, but concerning the Trust of a Bill, which is not contended to have been Indorsed to the Trustee; and therefore does not fall under the said Exception which relates only to Indorsations.

Triplied for the Pursuers, That the Exception ought to be extended not only to Indorsations, but to the Notes of all Companies, whether created by Law or Voluntar Contract. 1mo. Because the Exception is in the Terms of our former Law, and so to be extended; whereas the Statute is Correctory. 2do. *Ex Natura Contractus Societatis*, there is a mu

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tual Trust among all the Members of the Society, and the Deed of one obliges the other ; which Obligation arises from the Nature of the Contract it self, and so Deeds taken in Name of one of the Society, do accresce to all.

Actor Fleming.
Alter George
Mackenzie.

}

The Lords Found, That this being a Society in Relation to a Cargo of Timber, and the Bill given for a Part of that Cargo, it did not fall under the Act of Parliament 1696, anent Trusts, but under the Exception thereof.

Gibson, Clerk.

DECISION XIII.

Eodem Die, Inter Eosdem.

IN the foresaid Action, the Pursuers (for proving that the Bill was paid to *Monro*, as Trustee for the Behoof of the rest) having produced a Missive from the Lord *Nairn*, owning the Receipt of the Bill, and Indorsation to the Behoof of the Partners, with a Discharge apart by the Pursuers to him, whereupon he paid the Money; having also adduced Witnesses, who Deponed, *That the Bill was drawn on my Lord by his Wright for the Price of the Timber, and that there was a Discharge signed by the Pursuers, and it with the Bill delivered to Monro for receiving the Money for the common Behoof.* As also *James Richardson*, one of the Children's Tutors, having produced the above Receipt from the Company to him, warranting him against Arrestments. And *Lastly*, *Monro's Relict* having upon Oath produced some Receipts granted by the Pursuers to her Husband, of certain Sums, in Part Payment of Greater, due to them for their Interests in the Cargo; as also an Account of the Freight due to the Skipper by the several Parties, with an Order subjoined thereto to pay the same, and that it should be allowed to him out of their respective Shares.

Actor Fleming.
Alter George
Mackenzie.

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The Lords Found the above Documents, with the Discharge by the Society to the Lord Nairn, were sufficient Evidents to instruct the Payment of the Bill to Monro, as Trustee for the Behoof of the Society.

Gibson, Clerk.

DECISION XIV.

[3d December 1714.]

Children of Baillie Smith,

AGAINST

The Earl of Winton.

IN this Case, mentioned 1st December 1714, the saids Pursuers having also insisted for Payment of several Years Sallaries due by the Earl to their Father, as Factor, Manager, and Overseer of his Lordship's whole Affairs, both in the late Earl's Time, and since his Decease, in the Time the present Earl was Abroad, and also since his Return, to the Day of the Baillie's Death.

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Answered

Answered for the Earl, That the Act of Parliament anent short Prescriptions of Three Years, cuts off the Claim.

Replied for the Pursuers, That tho' Servants Fees be there mentioned, yet as the Words that immediately preceed, (*Mens Ordinaries*) seem not so very intelligible, if taken distinctly and separately from the succeeding Words; so the reading of the Act ought to be, (*Mens ordinary Servants Fees*;) as Sir George Mackenzie in his Observations on that Act, and Sir James Steuart in his Abridgment, read it; which would clearly make a Distinction betwixt ordinary Servants, and such as served in Baillie Smith's Rank and Quality. And this because ordinary Servants are not presumed to be able to want their Fees for any considerable Time, which takes not Place with respect to such as act in Baillie Smith's Quality.

Duplied for the Defender, That the Lords have found even the Fees of a Chamberlain or Grieve only probable by Witnesses, for Three Years before Citation, as 12th February 1680. *Ross contra* The Master of Salton.

Triplied for the Pursuers, That the Ground of that Decision was the Presumption that the Fees must necessarily have been paid, seeing nothing had been demanded for so long a Time; but in the present Case there was no Ground for that Presumption, in Regard of the Earl's Circumstances: For, from the late Earl's Death, till this Earl's Return, nothing could have been paid. Nor does the present Earl alledge, that he paid any Thing since his Return. And as to the Time before the late Earl's Death, at fitting Accompts there is no Allowance mentioned for Salary; only the late Earl promised to pay it: So that the *Ratio decidendi* in the Decision adduced, is the Presumption of Bygones being paid; whereas here that Presumption is taken off, by a much more pregnant Presumption of the Salaries being yet owing.

Astor Falconer. }
Alter Horn. }

The Lords Found the Salaries due to the Pursuers Father for his Service, preceeding the last Three Years before the Citation in this Process, prescribed quoad modum probandi, otherwise than by Writ, or the Defender's Oath, That the same is still resting owing. Vide 18th January 1715.

Gibson, Clerk.

DECISION XV.

[8th December 1714.]

William Lesly Merchant in Aberdeen,

AGAINST

David Robertson Younger of Gladney.

IN Anno 1709, Gladney Younger accepts a Bill for 450 Bolls of Salt to one Alexander Gordon, which he Indorsed to William Gordon, and he again to James Steuart Merchant in Edinburgh: Steuart charges, and a Suspension is presented by Gladney, wherein he alledges Circumvention by Alexander Gordon, and that he should have got Meal from him by way of Barter for the Salt; and offered to prove the same by Steuart's Oath: But he Deponing Negative, the Suspension was refused,

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refused ; whereupon *Gladney* transacted the Matter, got up the Bill, and gave *Steuart* a new one for 460 Bolls of Salt. This new Salt Bill is thereafter Indorsed to *William Lesly*, for the Value whereof he accepts a Bill for 736 *Lib. Scots* payable to *Steuart*, and Indorsed by him to *John Parkhill*, who having charged *Lesly* thereon, he paid the same ; whereupon *Lesly* charges *Gladney* for the Salt Bill, and he Suspends, still insisting upon *Alexander Gordon's* Fraud upon the first Bill.

After a Five Years litigious Debate, *Gladney* at length consents that Decreet might pass against him for the 736 *Lib. Scots* as the Price of the Salt, at 1 *Lib. 12 sh. per Boll* ; and now the Expences of Plea being the only Point in Controversy, *Lesly* the Charger insists that *Gladney* may be Decerned. 1mo. For a considerable Sum necessarily Depursed in Discussing the Suspension, and that upon the Act 1681, *Anent the Priviledges of Foreign Bills*, which is extended to Inland Bills by the Act 36. *Parl. 1696* ; as also insists upon the Act 22d of the said Parliament, *Anent Expences in Suspensions, in case the Suspender be Calumnious*. 2do. He insists for Damages for not Delivery of the Salt in the Terms of his Bill ; at least craves the Annualrent of the 736 *Lib. Nomine Damni*, from the Day it should have been delivered ; and this upon the foresaid Acts of Parliament, and because the Charger, when he acquired Right to the Salt Bill, granted a Bill for the Value, which he was compelled to pay. 3tio. He claims the Expences to be Depursed in Extracting the Decreet, or that *Gladney* may satisfy the Clerks.

Answered for *Gladney*, That the original Fraud of the *Gordons* being manifest by the Contract of Barter, and the Meal Bill extant in Process, and by the *Gordons* going off, when they had got free of the Salt Bill to *Steuart*, *Gladney* could be no calumnious Suspender, since now he was obliged to deliver the 460 Bolls of Salt by the Ordinary's Interlocutor, for which he had nothing. Nay, 2do. *Lesly* having precipitantly paid *Parkhill*, tho' there was Reduction raised at the Suspender's Charges, both against him and *Steuart* ; wherein the Lords had allowed *Lesly* the Benefit of *Steuart's* Oath for proving the Fraud, it would seem that *Lesly* ought rather to be liable in Expences.

Graham for Robert-
son. Alt. Leith. }

The Lords Found, That *Gladney* the Suspender was liable for the Annualrent of the Sums contained in the Money Bill accepted by the Charger, from the Time he paid the same ; and that in Lieu both of Damages and Expences.

Robertson, Clerk.

DECISION XVI.

[9th December 1714.]

Mr. James Baillie Advocate,

AGAINST

Baillie of Lamingtoun.

THE Deceast Sir William Baillie of Lamingtoun being Debitor to Mr. William Baillie Advocate, the now Lamingtoun made some partial Payments to Mr. William ; and Mr. James Baillie, as having Right,

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Right from his Father to these Debts, insists now against him on the passive Titles.

Answered for the Defender, That Mr. William the Pursuer's Father, having been Curator to him, no Action could be sustained at the Pursuer's Instance, for any Debt of Lamington's Predecessors, *ante redditas Rationes*, since the Pursuer could be in no better Case than his Father and Author.

Replied for the Pursuer, That the Curators Accompts were prescribed in the Terms of the Act 1696; and therefore the Exception no more to be regarded, than if the Pursuer's Father had been actually Discharged of his Accompts conform to the said Act.

Duplied for the Defender, 1mo. That tho' the Action for Compt and Reckoning be prescribed, yet the Exception was still intire, by the Rule in Law, *Temporaria ad agendum, sunt perpetua ad excipiendum*. 2do. It was presumed, That the Creditor having been Curator, *intus habuit*, whereby the Debt became extinct, *per Compensationem*; which takes Place *ipso jure*, and is Equivalent to Payment. And as to the Prescription being Equivalent to a Discharge, even an ample Discharge of the *Actio Tutela directa* in Favours of Mr. William Baillie, could never have skreened him from the Extinction of this Debt; for Law would never presume that the Discharge was granted Gratuitously, but from a Consciousness, that the Curator had applied his Intromissions in the Way he ought to do. And in the present Case, Law obliged him not only to Intromet, but to Apply his Intromissions to the Extinction of his own Debt; and since he was obliged to Apply his Intromissions in that Manner, Law will likewise presume he made the Application duly.

Triplied for the Pursuer, That if this were sustained, a Curator would be in a worse Case after the Prescription is run than before: For the contrary Action being also by that Act prescribed, the Curator can never bring the Minor to Accompt, and thereby the Presumption shall cut off the Curator from all Debts due by the Minor's Predecessors. 2do. There is no Obligation on a Curator to pay himself, only he has a Faculty to do it if he pleases, as is plain from L. 9. § 5. ff. *De Administratione Tutorum*.

Aitor M^r Doual. }
Alter Nasmyth. }

The Lords sustained the Defence on the Presumption, That the Pursuer Intus habet, his Father having been Curator to the Defender; and found the Act of Parliament takes not Place.

Gibson, Clerk.

DECISION XVII.

[14th December 1714.]

Dundas of Brestmiln,
AGAINST

The Representatives of Murray of Skirling.

THE Lands of Skirling belonging to Sir James Murray, having been Apprised by several of his Creditors, another Apprising is thereafter also led by Dundas of Brestmiln in Anno 1659; but in the Year 1662, the

the preferable Creditors enter into a Contract with Sir James, (*Brestmiln* being none of these Contractors) whereby they prorogate the Legal Reversion (then expired) for Four Years longer, and also restrict their Debts considerably; but provided, That if within that Space Sir James should fail to sell the Land, and with the Price to pay them, the Contract should be Void, and the saids Creditors their respective Debts return to their full Extent, *and are declared Irredeemable for ever, without Necessity of any Declarator, &c.*

The common Debitor not having made Use of the Benefit afforded him by the Contract, these Creditors sold their Interests to Lieutenant-General *Douglafs*, who being taken bound to pay to Sir James's Representative 1500 *Lib. Sterling*, for a Right in his Person, and for his Goodwill; *Brestmiln* raises Declarator for having it found, That he, by virtue of his Apprising, was preferable upon the said Ballance, yet lying in the Purchaser's Hands; where it being alledged for the Defenders, That their Apprisings were effectually expired, and therefore excluded *Brestmiln's* Apprising: And *Brestmiln* on the other Hand founding upon the said Contract in *Anno 1662*, whereby he alledged these Apprisings were still open and restricted, as in the Terms thereof; the Question was, *Whether from the above Clause irritant, the Creditors Contractors their Apprisings were duly expired, without Necessity of Declarator?* And,

It was Contended for the *Murrays*, That by the plain Words of the Contract, it appears to have been the Design of the Contractors, that the Creditors that return to the Extent of their Rights should immediately take Place upon Sir James's failing to pay; and where both the express Words of the Contract, and Design of Parties agree, Law cannot fail to support the Agreement; otherwise 'tis impossible to know by what Words to make a Contract Obligatory. And that no Declarator should be needful, appears from the great Abatements given.

Answered for the Pursuer, That the Legal of the Apprisings having once been open, and they turned into Conventional Redeemable Securities under an Irritancy, they would never after expire without a Declarator of that Irritancy, however the Contract was worded, since *Pactis privatorum non derogatur juri Communi*. And this was found in the Case between Sir Robert Miln, and Sir George Hamilton and Colonel Erskine.

Replied for the Defenders, That *Provisioe Hominis tollitur provisio Legis, & cuique Licitum est juri pro se introducto renunciare*; and therefore, if the Creditors Return by the said Clause had been simple, the Pursuer's Commentary might have taken Place; but when the Return is declared effectual without any Declarator, no Necessity of one can be pled; otherwise all Agreements, tho' never so express, would be precarious. For tho' Irritant Clauses, when Penal and Odious, may require a Declarator for their Completion; yet it is not so when they are adjected to Lucrative Concessions, as the Lords found, 20th June 1678, *Scot contra Falconer*. This also the Viscount of Stairs gives as his Opinion, *Institutiones*, Page 591. That Clauses irritant are effectual without a Declarator, where they are not exorbitantly Penal. And (says he) such Clauses are adjected to gratuitous Concessions, because then they are

not Penal, but are Conditions and Provisions qualifying the Right, and need no Declarator.

Astor Ro. Dundas.
Alter Sir Ja. Nasmyth
& Spotiswood.

The Lords Found, That the Clause contained in the Contract 1662 not being Penal, the Creditors Contractors did return to the full Extent of their Rights and Diligences after the Expiration of 4 Years, the Estate not being sold within that Time, and that without Declarator.

Dalrymple, Clerk.

DECISION XVIII.

Eodem Die.

Mr. Patrick Greenhill, and the other Creditors of Lyon of Banckrie,

AGAINST

Mr. Walter Steuart of Easter-Capeth.

IN this Case, as marked the 12th of November 1714, there having been these Two Points determined by the Lords, viz. 1mo. Whether the Husband or the Wife was Fiar? 2do. On Supposition that the Husband was Fiar, Whether the Wife could Revoke the Disposition granted to him, upon the Head of Minority and Lesion, because the Provisions made by the Husband to her were not Implemented? It came now under Debate, How far a Restitution upon the Head of Minority and Lesion was Competent, the Wife not having Revoked *intra annos utiles*? And it was alledged for Steuart, the second Husband, That the Wife was *non valens agere*, being Cloathed with a Husband during the *quadriennium Utile*, and that immediately upon his Death she raised Reduction, both as to the Fee and Liferent.

Replied for the Creditors of Lyon the first Husband, That she was *valens agere*, because a Wife might both Revoke and Reduce in her own Name, even tho' the Husband should not Concur; as she may do in all Things proper to herself, such as for Aliment, Implement of her Contract, &c. as was found 16th November 1675, Ronald contra Gibson.

Duplied for Steuart, That it appears the Brocard is most applicable to the Wife in this Case, from this, That Prescription does not run against a Wife's Liferent, while the Husband lives, as was found 22d June 1675, Gaw contra The Earl of Weems; nor against an Obligement to employ a Sum for a Wife's Use, the Prescription whereof was found only to run from the Husband's Death, 5th July 1665, Mackie contra Steuart. The Reason whereof is, That she is *sub Cura Mariti*, and considered as Minor. And therefore this much rather holds in Rights granted to the Husband himself; since the same *Reverentia Martialis* that induced her to the Deed, restrains from Revoking while the Husband lives, and much more from Reducing. And as to the Insisting for Aliment, &c.

Ans.

Answered, That it is not said that a Wife is utterly incapable of insisting in such Cases, but only that Negligence (the main Reason that introduces Prescriptions) cannot be imputed to her while *Vestita Viro*; and therefore much less in Affairs against himself.

Alfor Sir W^{al}. }
Pringle. Alter,
Graham.

The Lords found the Priviledge of Restitution upon Minority and Lesion competent to the Wife, in Regard she was Vestita Viro; and that immediately after Dissolution of the Marriage she Revoked, and Intended a Reduction before Diligence, done at the Instance of her Husband's Creditors. Vide 16th February 1715.
Gibson, Clerk.

DECISION XIX.

[15th December 1714.]

Gilbert M'Kay one of the Depute-Clerks to the Bills.

AGAINST

Campbell of Burnbank Store-Master to the Castle of Edinburgh;
and Colonel Steuart Deputy-Governour thereof.

Burnbank being under Caption at the Instance of Gilbert M'Kay, a Messenger apprehends him in Edinburgh Castle; but the Governour having ordered the Gates to be shut till the Prisoner should be dismissed, the Execution of the Letters was stopt: Whereupon M'Kay gives in a Complaint to the Lords; which having occasioned Answers, the Case under Debate was, Whether the Castle of Edinburgh was a Sanctuary, and had *Jus Asyli*?

And it was *Alledged* for the Governour and His Majesty's Advocate, That it was a Sanctuary as well as the *Abbey*, because of the Statute of King William, Cap. 4, 5. where 'tis said, *That he who unjustly withdraws himself from the Attachment, the Officer shall raise the King's Horn upon him for that Deforcement, until the King's Castle; whereby such Diligence is bounded, (until the King's House.)* And Cap. 5. *If any Man strike or beat another within Sanctuary, he shall pay a Fine to the King; therefore the King's House is a Sanctuary, otherwise the Fine should have been paid to the Church.* And this conform also to the Civil Law, where the Emperors Palaces are called, *Aedes nobis Consecratae*. And to the Law of Nations, all Princes Palaces in Europe, nay Ambassadors Houses, being so Priviledged. 2do. This was never Disputed, and *Magna Autoritatis habetur, quod in tantum probatum est ut non fuerit necesse scripto id comprehendere*, this being the greatest Evidence of the *Consensus utentium*; nor is there any other Authority for the Common Law of England, and Customary Laws of France. 3tio. As Sanctuaries were not rejected by the *Mosaical Law*, so the Objections of late raised against them do cease in the present Case, *viz.* The Insolencies with which the Romish Clergy supported the Priviledges of these Places, and their making them Sanctuaries for Criminals. But Sanctuaries for

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private

private Debts, such as the Precincts of Whitehall, the Savoy, the Mint, &c. have still been reckoned *inter Levamina inopum Debitorum*.

Answered for the Complainer, to the First, That by the Act 173. Parl. 13. Ja. VI. those Statutes of King William are expressly restricted to the King's Palaces where he actually had his Residence for the Time. And as to the Civil Law, the very Law here insisted on says, That *In-clyta Palatia ab omni privatorum usu & Communi Habitatione excipimus*. Nor by that Law were the Persons of such as were in the Princes Service, or inhabited his proper Patrimony, excoemed from Diligence, as is expressly declared in L.2.C. *De Conduct: Dom: August: ut pari Disceptationis eventu in omnibus Causis Legibus serviant*. Neither is there any such Privilege mentioned to the Princes Palaces in all the Titles, *De his qui Confug. ad Eccl.* and *De his qui Confug. ad Stat. Princ.* And *Osiander, Jacob. Gotofred.* and others, who have writ expressly *De Asyilis*, take no Notice of any *Jus Asyli* belonging to them. And as to *Ambassadors Houses*, if any Country indulge it to them, it depends intirely upon the Good-will of the Prince with whom they Reside; but is nowise founded on the Law of Naure or Nations; as says *De Grot. De Jure Belli & Pac. L. 2. Cap. 18. No. 2.* And it was stily refused to the French Ambassador by Pope Innocent II. because he could give no Reason for it. And this also proves, that it cannot be here without an Act of Parliament, or the like. To the Second, *Answered*, That Custom cannot be obtruded as Law, meerly *ex Opinioe Vulgi*, unless it had been the Opinion of Lawyers, or the Lords had so Decided. Nay, as to the former of these, Sir George Mackenzie in his *Observations* upon Act 35. Parl. 5. Ja. III. says expressly the Contrary; so that tho' no Caption had ever been executed there, yet this can never give Privilege by Prescription, unless by contrary Acts they had asserted their Privilege all the Years of a Legal Prescription. To the Third, That there is no Proof offered, that any such Privilege belongs to the abovementioned Places in and about London; and tho' it were so, yet they may have it either by Express Concession, or clear Prescription; and then their Authority can have no Weight in the present Case.

It was further *Alledged* for the Complainer, That the Castle being now converted to an other Use, and become a Garrison, that relative Sanctity (if ever any there was) can now take no Place; and tho' some of our Kings have resided there, yet it seems to have been principally designed for a Fort rather than a Palace. 2do. That no Argument can be drawn from the Palace of Holy-wood-house, since its being a Sanctuary, is only the Remains of the Privileges belonging to religious Houses; which Privileges are continued to such Places even in reformed Countrys beyond Seas; as appears from *Simon Van Lewen in his Censur: For: Par: 2. Lib. 1. Cap: 1. 3tio.* If these Reasons prevail, the like may be said of Falkland, Linlithgow, &c.

Answered for the Lord Advocate to the First, That when any Place is vested with a privilege, it continues in that Case, till it be Disfranchized. And therefore the Castles becoming a Fort, will not Disfranchise it, since it does not cease to be the King's House, nor come into any private Use. To the Second, It was *Answered*, That the Pretence is precarious, and even these religious Places Abroad, derived their Privileges from Grants of the respective Princes, which was only to communicate

to them the Priviledges of the Princes own Palaces: Nay, the Castle of *Edinburgh*, having anciently been *Castrum puellarum*, it was Originally a religious House, as well as the *Abbey*. To the *Third*, It was *Answered*, 1mo. There has been no common nor settled Beleif, that these above-named Palaces were Sanctuaries. 2do. They are not *Constabularys*, nor *Garrisons*. 3tio: They are now private Dwellings.

Actor Charles Erskine, Alter Lord Advocate.

The Lords found, The Castle of *Edinburgh* hath no Priviledge of Sanctuary, to hinder the Execution of the King's Letters.

Mackenzie, Clerk.

DECISION XX.

Eodem Die, Inter Eosdem.

IT was seperatly alledged for Colonel *Steuart*, 1mo. That the Castle as being a *Constabulary* and *Fort*, has its Constables, Governours, Deputies, &c. who cannot, without betraying Trust, admit Persons within the Garrison to be carried off; specially such as by the Nature of their Trust, must necessarily reside upon the Place. Since at that Rate the whole Garrison might possibly be carried off by Captions. 2do. These being *Military* Trusts, they cannot be directed in shutting or opening of their Gates but in the *Military* Way.

Answered for the Complainer, To the *First*, That as the *Store-master* can claim no greater Priviledge than any Souldier within the Garrison, so why any of them should be more Priviledged than other Troops under his Majesty's Pay, can scarce be accounted for. And the Argument drawn from the Inconveniencys, is of no Force, unless we suppose his Majesty is not to be served but by Dyvours and Bankrups. To the *Second*, *Answered*, That a Sentence prohibiting the Governour to hinder the Laws to take Place, is not contrary to the Trust reposed in him, and undoubtedly the Authority of our Sovereign Courts, reaches as well within Garrisons as else where. And its plainly for the Credit and Honour of the Government, that such People be expelled, when there is no Difficulty of having their Places supplied; and that its possible to find an other in every Respect as fit for that Charge.

The Lords assoilzied Colonel *Steuart* from the Complaint: Yet ordained him to deliver *Burnbank* to a Messenger, having the Caption, and demanding him in Case only of the said *Burnbank* his returning to the Castle, and his being there the Time of demanding.

Actor Charles Erskine, Alter Lord Advocate.

Mackenzie, Clerk.

D E C I S I O N XXI.

[16 December 1714.]

John Spruil of Miltoun,

A G A I N S T

The Duke of Douglass.

TH E late Marquis of *Douglass* in a Contract of Marriage of one Mrs. *Jean Douglass*, obliged himself to pay Fifty Pound *Sterling* to her in Liferent, and to Mr. *Alexander Inglis* her Husband in Fee by way of Tocher, with 100 *Lib. Scots* yearly, to her during Life: The Fee of the 50 *Lib. Sterling*, upon *Inglis* his Death was assigned by his Executrix, to Mr. *Thomas Hamilton* the Second Husband; who transferred the same to his Wife: But he made likewise an other Assignment thereafter of the said 50 *Lib.* in favours of *Lilias Douglass* his Wifes Sister in Liferent, and to *Leggats* her Children in Fee.

The late Marquis having made Payment both of the Annualrents of 50 *Lib. Sterl.* and the Yearly Annuity of 100 *Lib. Scots* during Mrs. *Douglas's* Life; and the present Duke having paid some Part of the 50 *Lib.* to the *Leggats*, as the nearest of Kin to Mrs. *Douglas*, as having Right thereto by the Two several Rights above-mentioned, as also by a Decreet of *Privy-Council*, ordaining the Marquis to pay the same to her in her Husband's Absence, in Name of Aliment. *John Spruel* now insists against the present Duke, as deriving Right to the saids Subjects from the said Mr. *Thomas Hamilton*, who prior to the above Rights had Transferred the Subjects in Favours of *Crawfurd of Cloberhill*, and delivered up to him the Decreet against the Marquis for Payment; and *Cloberhill*, for further Security, did also Arrest in the Marquis's Hands, and the Furthcoming came the length of an Act, Assigning a Term to the Marquis to Depone, as to the Rests of the 100 *Lib. Scots* Annuity, and Assigning a Term to prove the 50 *Lib. Sterl. Scripto* of the Marquis; But *Cloberhill* shortly thereafter Dying, *Spruel* his Creditor Confirms the Premisses, and Pursues the Duke on the Passive Title. It was Alledged for the Pursuer, That the alledged Payments could not be made *bona fide*, because the Grounds of the Debt were not in the Hands of the *Leggats*, without which they could no more oblige the Marquis or Duke to pay, than an Assigney producing his Assignment without the Bond, in which Case the Debitor paying, does it on his Perril. 2do. That *Cloberhill* had Arrested, and in the Forthcoming the Marquis had Deponed, and *Avisandum* therewith made, so that being so Notably Interpelled, he could not make Payment to another Party *bona fide*, which takes Place even as to the Duke, the Act being a judicial Contract.

Answered for the Defender to the First, That the Marquis could have no Ground to Doubt Mr. *Hamilton's* Right, to whom he had been in Use to pay before, nor could he have any Reason to suspect that Mr. *Hamilton* had conveyed the same Subject to any other, having already Assigned it to the *Leggats*, and so was still in *bona fide* to pay to them, till another Right were Intimate; for otherways at every Payment, the Creditors whole Progress must be produced to the Debitor.

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To the *Second*, *Answered*, That the Arrestment was Prescribed, being laid on in *Anno* 1695, and the Marquis his Oath taken in 1697, but nothing thenceforth done in it; tho' the Act of Parliament requires Arrestments to be Wakened every Five Years, otherways to Prescribe in Ten Years.

Replied, That no Prescription could here take Place, because of the *Avifandum* taken with the Marquis's Oath in the Forthcoming, after which there can be no Prescription, except that of 40 Years.

Duplyed, That tho' in that Case there needs no Wakening, even after the Year, yet that does not hinder Prescription to take Place, if the Cause be not insisted in within the Time appointed by Law.

It was *Separatim* also *Answered* for the Defender, That it is of little Import, whether the Arrestment be Prescribed or not, since the Subject it self was not Arrestable, seeing it had been given as an Aliment to Mrs. *Jean Douglas* during Life by Decreet of Privy Council.

Replied for the Pursuer, That Aliments are rarely given to Wives in Prejudice of lawful Creditors: But the Decreet of Aliment bearing, (*That it was given because the Husband had left the Wife in a Starving Condition*) how soon she returned to, and was maintained by her Husband, the Aliment ceased; Therefore after the Husbonds Return, at least after the Wifes Death, the Payments made to him by the Marquis, can in no Sense be said to have been on account of the Wifes Aliment: Nor are his Receipts and Discharges relative to any Aliment: Nor can it be said, that these Payments after her Death were in Satisfaction of the Aliment for the Years she lived and got no Payment; since the Decreet of privy Council overturns that Argument, seeing Aliment was given because her Husband had left her Destitute, therefore when she returned to be Maintained by him, her Aliment ceased.

Duplied for the Defender, That the Decreet of Aliment gave the Wife a Right during Life: So that whither the yearly Payments were made to her self or to her Husband; yet it could only be upon her Right as constitute by the Act of Council; and if there was any of the Aliment unuplifted when Mrs. *Douglass* Died, it would have belonged to her nearest of Kin; and supposing the Husband might lay Claim to it, because of the Presumption of his having Alimented her, yet that could be of no Use to this Pursuer; for the Husband's Claim to these Rests came only to exist upon his Wifes Death, for she had the intire Right during her Life; so that no Diligence of any of his Creditors preceeding the Time, could affect the Subject: So as either to hinder Mr. *Hamilton* himself to uplift the same, or far less to put the Debitor in *mala fide* to pay.

The Lords found the 100 Lib. Scots yearly and the Annualrent of the 50 Lib. Sterling, Appropriated by the Privy Council for Mrs. Hamilton her Aliment; was not affectable by Arrestment, at the Instance of the Husband's Creditors. And also Found, That the Arrestment could only affect the Bygones of the 100 Lib. yearly, and the Annualrent. And also sustained the Payments by the Duke as made bona fide, in respect the Arrest-

Actor Sir John Fer-
guson, Alter Mr. Tho-
mas Kennedy. }

ment was not renewed, nor any Diligence on the Arrestment in his Father's Time against him, till after his Father's Payments; and upon a reclaiming Bill and Answers, the Lords adhered to their former Interlocutor as to the Payments made by the Marquis, but remitted to the Ordinary to hear Partys Procurators upon what was mutually represented, in relation to Payments made by the Duke.

Robertson, Clerk.

DECISION XXII.

[17th December 1714.]

Strachan of Glenkindy,

AGAINST

Dumbar of Grangehill.

THE Deceast Grangehill, by his Bond of Provision in Favours of Mary Dumbar his Eldest Daughter, binds to pay to her, her Heirs, &c. (secluding Assigneys) 8000 Merks after her Marriage; and in Testament, Names certain Friends, by whose Advice his Children (who were then Minors) should be ordered. With Consent of these, she having entered into a Contract of Marriage with Sutherland of Kilminty, they assigned the apparent Husband, his Heirs, &c. to the said Sum, and he transferred the same to Glenkindy; And it being controverted what the Import of the Words, (secluding Assigneys) should be, even tho' there were Children of the Marriage.

It was alledged for Grangehill, That the Assignment could not be sustained, tho' in a Contract of Marriage, because Assigneys were expressly excepted in the Body of the Write.

Answered for Glenkindy, That such Exceptions were only to be understood to seclude voluntar Rights to extraneous Persons, and not legal Assignies, such as the Husband became by the Marriage: For if it were otherwise, it would overturn the Design of the Bond, the Cause whereof rendered by the Father in the Preamble was, (for his said Daughters creditable and honest Provision, and Settlement in the World) by which it's plain to have been the Father's Design that the said Sum should go to his Daughter *Nomine Dotis*.

Replied, for the present Grangehill, That the Clause in the Bond was clear, secluding Assignies in general, and therefore there was no Ground for the above Distinction.

Duplied for Glenkindy, That the above Interpretation was sufficiently cleared by the Terms of Payment in the Bond, viz. The one Half at the Term of *Whitsunday*, after Expiration of Year and Day of the Marriage, and the other Half at the next *Whitsunday* thereafter: So that the very Payment to the Wife made it belong to the Husband *jure Mariti*: And there being no Clause oblidging the Husband to re-employ (which the Father would have done if he had designed the Fee of the Money to have for ever continued with her Heirs) he justly claims the yearly

Annu-

Annualrents even after the Marriage, with as good Ground as the principal Sums, both being provided and payable in the same Manner.

After Horn. }
Alter Se.

The Lords Found, That tho' the Bond of Provision to the Daughter secludes Assignies, yet that did not hinder her to Assign the same to her Husband by Contract of Marriage; and therefore found the Defender liable, and repelled the Defences.

Robertson, Clerk.

DECISION XXIII.

[17th November 1714.]

Mark Drummond, and Mr. David Drummond his Father and Administrator, and Charles Learmont,

AGAINST

James Sinclair.

THE deceast Charles Learmont being in the Year 1699 to go Abroad, makes an Assignment in Favours of James Sinclair of the Rents of some Houses in Edinburgh, for Payment of several Debts due to the Assigney and others, all contained in the Assignment: Which Assignment bears to be for 13 Years, and ay and while these Debts should be paid, with Allowance of 5 Lib. Sterling of Yearly Salary. Shortly after granting this Assignment and Factory, he grants a Bond of Tailzie in Favours of Charles Learmont his Nephew and the said Mark Drummond, Tailzieing to them (failing Heirs of his own Body) the foresaid Houses: Whereupon, after his Decease, they were served Heirs of Tailzie, and in Implement of the Bond, Adjudged; and now insist, That either the Subject may be sequestrate in another Factor's Hands, whom the Pursuers would Name, and who would serve *Gratis*; or if Mr. Sinclair inclined to continue, that the Lords would discharge the Continuance of his Salary.

Answered for the Defender, That the Right in Question being a Disposition granted ay and while he and the other Creditors were paid, with a Salary for managing the Subject; therefore, as the Granter could not remove him, or invert his Possession, till the Debts were paid, so neither can his Heirs of Tailzie, who are liable in Warrandice.

Replied for the Pursuers, 1mo. That the Right is no real Right, but a naked Assignment to Mails and Duties with a Factory; and these subsist no longer than the Granter's Life: And tho' Heirs be liable in Warrandice, yet that's only to be understood according to the Nature of the Right; and so the Warrandice here cannot be said to be Contraveened by the Heirs taking on them the Managing of their own Estates, and Intrometting with the Rents after their Predecessor's Death, which are indeed not assigned, and far less are they obliged to continue a Salary to a Factor. And yet, 2do. They are willing the Rents be up-

lifted by a Factor, (for the Behoof of the Creditors, if any yet remain) whom they will find to serve *Gratis*.

Astor Falconer. }
Alter Hay. }

The Lords Found no Salary due to James Sinclair from Martinmas last; but allow'd him to continue his Possession, he finding Caution to Compt to all Parties having Interest, and to do Diligence: And in case of his Refusal, Remitted to the Ordinary to Sequestrate, and appoint a Factor in common Form.

Gibson, Clerk.

DECISION XXIV.

Eodem Die.

Janet Crawford Lady Dalegles Elder,

AGAINST

John Crawford now of Dalegles, and Margaret Cuninghame his Mother and Tutrix.

THE Lady *Dalegles Elder*, by her Contract of Marriage, was Infeft in Liferent of the One Merk Land of *Nether Fardin* alias *Rigfoot*; and there being a Moss called, *Fardin Moss*, which lies betwixt the said Land, and the One Merk Land of *Dalegles*, but Contigue to both; the Old Lady contends, That the said *Fardin Moss* is Part and Pertinent of *Nether Fardin* her Jointure Lands; and *Dalegles* her Grandson, contends it to be Part and Pertinent of the One Merk Land of *Dalegles*.

Alledged for the Lady, 1mo. That the very Name of *Fardin Moss* shows that Piece of Ground to belong to *Nether Fardin*. 2do. The same appears from the Thing it self, since otherwise there would be a very odd Inequality betwixt the Rents of the two several Merk Lands; the Rent of *Dalegles* being betwixt 3 and 400 Merks, and the Rent of *Fardin Moss* 70 Merks, and the Remainder of *Nether Fardin* but 110 Merks; so that *Dalegles* will be above a Third more than *Nether Fardin*, comprehending *Fardin Moss*, and Three Times as much as the Remainder, wanting *Fardin Moss*: An Inequality too great to be presumed between Neighbouring Tenements of the same Valuation.

Answered to the First, That the Lands of *Nether Fardin* are also called *Rigfoot*, and so Denominate in the Lady's Contract; whereas there is another Room not Liferented by her, which is called *Over Fardin*, also Contigue to the Moss in Question: So that if any Argument can be drawn from the Name, it would more Naturally apply to the *Over Fardin*, which still keeps the Name of *Fardin*, than to *Nether Fardin*, which has also another Name. To the Second, *Answered*, That the Disparity betwixt the Rooms can be no Argument; otherwise the Pursuer, to make an Equality, might contain not only the Moss, but the Third more of *Dalegles*: Since, even tho' the Moss were joined to *Nether Fardin*, by the Pursuer's own Computation, the Lands of *Dalegles* would be Double the Rent thereof; and if two Neighbouring Merk Lands

Lands could differ so far, the small Addition of the Rent of the Moss can afford no Argument.

Stevenson for the
Old Lady. Alter }
Boswel.

The Lords Found the Lands of Fardin Moss in Controversy, to be Part and Pertinent of the Lands of Nether Fardin, alias Rigfoot; wherein the Pursuer is Infeft in Liferent.

Gibson, Clerk.

D E C I S I O N XXV.

[18th December 1714.]

James M'Donald in Comrie,

A G A I N S T

John M'Donald Glover in Fortrose.

William M'Donald having granted Disposition of some Burrow-Acres in Favours of *James* his Brother; he thereupon Intents Reduction of an Heritable Bond granted by the said common Debitor in Favours of *John M'Donald*: And it being Answered for *John*, That the Disposition being Two Sheets, was Null, as not being signed at the Juncture, and nothing written upon the last Sheet but Words of common Stile. He *Replied*, That no Statute required the Sidescribing of Writs; and tho' in the Act 96, allowing Securities to be written Book-ways, one Clause says, *Providing that if they be written Book-ways, every Page be marked and signed, as the Margins were before*; yet this does not infer an established Custom to Sidescribe: Because, *imo*. It is not enough that an Act presume barely the Custom of Sidescribing, to make it the Rule; but it must also presume that Unscribed Writs are Null, which this Act does not, but only presumes that Margins were signed before; which Custom will not infer a Nullity in a Writ not Sidescribed, till it can be shown by a constant uniform Run of Decisions: Nay, One or Two in such a Case would not suffice, the Law being, *Quod frequenter in eodem Controversiarum genere servatum fuit, L. 1. C. Qu. sit Long. Consuet.* far less then can even a constant Course of Decisions infer so heavy a Penalty.

Duplied for the Defender, That certainly in General an Unscribed Security of this Kind must justly be thought to be no Security; because not given under the Hand of the Granter, since nothing above the last Sheet of a Security Unscribed can be said to be so given: For so it were in the Power of any Person, to prefix what he pleases to a Man's Subscription, and bind him thereby. *2do*. This Necessity of Sidescribing is established by inveterate Custom, and the Knowledge of every Person proves the Fact and Custom, tho' *Facti*, in this Case, needs no other Proof. *3tio*. 'Tis evident from the abovesaid Act of Parliament, where not only the Words quoted by the Pursuer are set down about the Middle of the Act, but the last Words of it are, *Declaring such Writs to be as valid and formal, as if written on several Sheets battered and signed on the Margin, according to the present Custom*: Where Custom is

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proven

proven with a Witness; for if the one be valid and formal, the other must be invalid and informal. And doubtless long and uniform Custom is the best advised Law, and *Quod Usus approbavit, &c.* For tho' Decisions be good Proofs of Custom, yet inveterate uncontroverted Custom must be better; because, if the Thing had not been controverted, Decisions thereon had been needless.

Astor Geo. Mackenzie. }
Alter Arch. Hamilton. }

The Lords sustained the Nullity, That the Disposition produced by the Pursuer, as his Title in this Process, was not Sidescribed; the Writ being granted and not Sidescribed on the joining of the Sheets, after the Act of Parliament establishing the Custom of Sidescribing the Joinings.

Mackenzie, Clerk,

DECISION XXVI.

[14th January 1715.]

Henry Eccles and David Craigie Merchants in Edinburgh,
AGAINST
William Robertson Vintner in Holy-Rood-House.

THE said *William Robertson* having employ'd *John Lind Couper* in *Leith*, to choice and send up to him two Hogsheads of Wine; *Lind* accordingly choosed one of them, in the Cellar belonging to *Henry Eccles* and *David Craigie*, which they thereupon sent up to *Robertson*. Thereafter the saids Merchants having acquainted *Robertson* that they had sent him a Hogshead of Wine, which *Lind* had bought on his Account; he told them, That he had employ'd *Lind*, but knew not from whom he had got the Wine: Whereupon *Robertson* goes with them to *Lind's* House, where *Lind* told him, That one of the Hogsheads was got from the Pursuers, in Presence of Mr. *Eccles* one of them, and several others; but gave no express Order to *Robertson* to pay them. Nevertheless sometime thereafter *Lind* draws a Bill upon *Robertson* for the Price of both the Hogsheads, payable to *James Murray* Merchant; wherewith *Robertson* having acquainted the Pursuers, and certify'd them, That if they did not settle the Matter with *Lind* he would accept the Bill: Accordingly, after 3 Months Delay, he accepted, and thereafter paid the whole to *Murray*. But Mr. *Eccles* and *Craigie* insist against him still, as liable to them in Payment of an Hogshead: And that,

1^{mo}. Because a Couper is only employ'd as a *Proxenetæ* or Broker, for Tasting and Choosing Wine, which the Merchant himself sells to the Vintner. Nay, by the Custom of all Trading Nations, observed by *Sraccha de Mercatura*, Brokers are prohibited to deal for their own Be-
hoof in these Subjects in which they use to procure for others. 2^{do}. *Lind* in his above Declaration, says not that he bought the Wine from the Pursuers, but that it belonged to them, and therefore he is to be considered only as a *Nuncius* or Servant. 3^{tio}. Tho' *Lind* had really bought the Wine himself, yet his above Declaration evinces, that if they sold it to *Lind*, it was in *Robertson's* Name.

An-

Answered for the Defender, To the *First*, That the Assertion is without either Authority or Reason: For as it's Arbitrary for any Man to gratify another, by buying any thing upon his own Credit, and giving it to his Neighbour at the same Price: So it were ridiculous to cut off Coupers, from the common Priviledges of Mankind: And in our Practice, Coupers do trade for their own Behoof; nay, by the Law of the Burgh, they must be Burgeses and Gild, and consequently are intituled to Merchandize. To the *Second* and *Third*, *Answered*, That the simple Declaration that the Wine belonged to the Pursuers, could never infer, That the Defender thereby, became liable to them; for one would think, if *Lind* had intended any such thing, he would have drawn a Bill upon the Defender to the Pursuers, as he did to *James Murray*: And having not done it, it's clear that he acted not as a *proxenet*, but judged himself bound for the Price. *2do*. The Defender never having agreed to become the Pursuer's Debitor, and thus remaining still Debitor to *Lind*, with whom only he Contracted, he did *optima fide* thereafter accept of his Precept, and pay it to *Murray* accordingly; specially considering his Delay for Three Moneths to accept, and his desiring them in the Interim, to do something in the Matter, with Certification that he behooved otherwise to accept: So that it is plainly imputeable to themselves, that they did not either adjust the Matter with *Lind*, and *Murray*, or secure the Price in the Defender's Hands by an Arrestment.

Actor Robert
Gargie Alter
Walter Steuart.

The Lords found, That the Payments made by the Defender to Murray by Lind's Order, were made bona fide, and that the same is relevant to assoilzie, unless the Pursuers offer to prove by the Defender's Oath, that he promised to pay them, or that Lind ordered the Defender to pay them, and that he acquiesced.

Robertson, Clerk.

DECISION XXVII.

[18th January 1715.]

Thomas Main Merchant in *Linlithgow*,

AGAINST

James Maxwell Merchant in *Glasgow* and others.

Thomas Main as Creditor to *Robert Simpson* Merchant in *Stirling*, having arrested in the Hands of the Keeper of the Weighhouse of *Glasgow*, Ten Hogsheads of Tobacco, as sold by *James Maxwell* to *Simpson's* Wife. In a Process of Furthcoming, The Proof of the Sale was the Weighhouse book, wherein it was set down, that *James Maxwell* weighed to *Simpson's* Wife Ten Hogsheads: But in the same Book it's marked the next Day, that *James Maxwell* cellared the said Ten Hogsheads upon his own account. And also it stands marked in the same Book, that thereafter *Maxwell* removed the said Ten Hogsheads, and paid the Cellarage.

The Lords having found this was a Sale, whereby the Property was transferred to *Simpson*: This obliged *Maxwel* to have recourse to another Topick, viz. That *Simpson* at the Time was Insolvent, broke very soon thereafter, and that it was Fraudulent in him to induce *Maxwel* to this Sale, and trust him the Price; and thereby gave Access to his Creditors to arrest, which was sufficient to rescind the Vendition; and for proving *Simpson's* Insolvency, *Maxwel* produces a Disposition *Omnium bonorum* granted by him to his Creditors, The Debts being all contracted before the Sale of the Tobacco.

The Debate having resolved in these Two Questions, 1^{mo}. Whither *Maxwels* being induced by Fraud to sell the Tobacco be relevant to rescind the Sale? 2^{do}. Whither the above Disposition, and other Adminicles do prove the Fraud?

It was *Alledged* for *Main*, the Arrester 1^{mo}. That he having duly affected the Goods, the Property whereof the Lords found was conveyed to *Simpson*, any Alledgeance of Fraud arising from *Simpson's* Insolvency, was but personal, and could not affect *Main*, who was not partaker of it, knew nothing of *Simpson's* Circumstances, and duly affected the Goods by his Diligence: That this was consonant to the *Actio Pauliana*, which was only personal; and to our Statute 1621, Whereby *Purchasers* *nowise* Partakers of the Fraud, are secure. 2^{do}. There was no sufficient Proof that *Simpson* was Bankrupt, he was a trading Merchant at the Time, and continuing to Trade thereafter; and that this would be a bad Preparative to unsecure Purchasers, or Creditors using lawful Diligence for affecting their Debtors Means, if such latent Circumstances should cut off their Property.

Answered for *Maxwel*, To the First, That this precise Case is already solemnly determined by the Lords 22^d. December 1680, *Prince contra Pallat*; where *Arthur Udney* having ordered *Pallat* Merchant in *Bourdeaux*, to send him Three Tun of Wine, he accordingly loaded it; but hearing thereafter that *Udney* was like to break, he wrote to his Correspondent to receive the Wines from the Skipper, and not to deliver them to *Udney*; *Magnus Prince Udney's* Creditor arrested the Wines in the Ship. In the Competition between *Prince* and *Pallat*, The Lords found, *That the Wines being delivered to the Skipper upon Udney's Order, the Property became his, but found it relevant by his Books or Oath, that his Debts exceeded his Estate the Time he gave the Order, to annul the Contract of Vendition*: By which Decision Fraud is expressly found a sufficient Ground to annul the Sale. Nor is there any Decision since, altering it. 2^{do}. There are also good Grounds in Law for this: For when a Person is *Dolose* induced to Contract, which is termed *Dolus dans Causam Contractui*, this renders the Contract Void, (the Fraud impeding the Consent) and consequently the Property could not be conveyed by a void Title. And as to what was alledged anent a Third Party, who is not *particeps fraudis*, it is as certain that what Exception is competent against the Author, is likewise competent against the Assignee or Successor: For tho' Fraud be personal as to the penal Effects of Damage thence arising, or (for the Benefit of Commerce) when one Purchases Moveables *bona fide* for a true Price; yet it's another thing where there is no Purchaser, but a prior Creditor, who did not lend his Money upon the Prospect of these Goods, being in his Debtor's Possession, only ar-

arrests for his Debt, for he cannot be in a better Case than his Debitor. So the Favour of Commerce does not come in here, to make an Exception from the common Rule.

To the *Second*, It was *Answered*, That the Disposition by it self, was more than Enough to prove the Fraud, since therein he disponeth his whole Effects in so far as they would go, for Payment of his Debts.

Graham for Main,
Alter Sir Walter
Pringle.

The Lords found the Defence, viz. That Maxwel was induced by Frand to sell the Tobacco, relevant to reduce and annull the Sale. And found the Fraud proven by Simpson's Assignment to the said Maxwel and his other Creditors: And therefore preferred Maxwel to Main the Arrester.

Roberton, Clerk.

DECISION XXVIII.

Eodem Die.

Children of Baillie Smith,

AGAINST

The Earl of Winton.

IN this Debate as mentioned, the First of December 1714, The Lords having found the Earl liable to refund the 100 Lib. Sterling advanced by the Baillie to Sir Walter Seton, but having given no Answer as to the Annualrents thereof, tho' also libelled; The Children now apply for these also to be decerned for, and that.

Because the Money was advanced upon the Earl's account; Wherefore it ought to be refunded *cum omni-Causa*; this being the natural Effect of Money expended in *Negotii gestione*, that the Advancer be fully reimbursed, since it's *Contra bonam fidem locupletari cum alterius jactura*.

Answered for the Earl, That *Usuræ non Debentur nisi ex pacto vel Lege*.

Replied for the Pursuers, That that Rule admits of several Exceptions, where Annualrent is allowed for Damage and Interest. Thus in the Case of a Cautioner's paying for a Principal, where the Principal stands bound for the Interest after the Cautioner's making Payment, tho' the original Bond did not bear Annualrent, as was found 4th December 1629, Laird of Cockpool, contra Johnston, which is founded upon the general Principle, That a *Mandatarius* or *Negotiorum gestor* is to be refunded *cum omni Causa*.

Duplied for the Defender, That the Decision adduced did not meet the present Case, Since there, the Annualrents are due *pacto* by the Clause of Releif; whereby the Principal stands bound to relieve the Cautioner, of all Cost, Skaith and Damage, under which the Annualrent of the Annualrent paid by him, is comprehended; since for the most Part Cautioners are obliged to borrow Money upon Annualrent to pay for the Releif of their Cautionry.

Astor Falconer.
Alter Horn.

The Lords Assoillied from the Annualrents.

Gibson, Clerk.

D E C I S I O N XXIX.

Eodem Die, Inter Eosdem.

IN the foresaid Action as mentioned 3d December 1714, Where the Lords found, the Salaries due to Baillie Smith for his Service, preceeding the last Three Years before Citation in this Process, prescribed *quo ad modum probandi*, the Pursuers Reclaimed. And

Alledged, That whatever might be said as to the first two Years, whereof the Accompts are fitted; yet as to the second two Years, whereof the Accompts are not yet cleared, there could not be the least Ground for finding the Salaries for these Years prescribed, since these came plainly to the Case between Sir David Nairn and the Dutcheß of Buccleugh: For the Accompts not being cleared, the Salary due at that Time, can never be looked upon as prescribed.

Answered for the Defender, That tho' a Salary for these two Years, might be claimed when the Pursuers come to Compt for the Baillies Intromissions; yet that is not the present Case, which is a Pursuit for a great many Salaries alleged due, which Law presumes to have been paid: And the most the Pursuers can urge is, That the Lords would reserve the Consideration of the said two Years Salaries, till they be called to Compt for their Father's Intromissions: Before which Time, it's no less ill founded to claim Payment of these, than the other various Claims: For it's presumed the Factor *intus habet* to pay his own Salary; and 'tis a Piece of Noveltry to demand Payment thereof, otherwise then by an Action of Exoneration and Compt and Reckoning.

Replied for the Pursuers, That the Point came very well here to be Decided: For if these two Years be due, and are preserved from the Prescription, then there is Place for an Action for them. The Speciality in the Case of Sir David Nairn and the Dutcheß of Buccleugh consisted in this, That Prescription could not be objected against Sir David, in regard he had been an Intrometter, and was bound to Charge and Discharge himself, and so could not sepearat the Salaries from the Accompt, which in effect is an Interruption of the Prescription. Indeed the Pursuers could not hinder the Earl to Answer *intus habetis*, and therefore they were ready to subject themselves instantly to Accompt for these two Years; but if the Earl will not Answer, as he may, and admit the Compt and Reckoning, there is no Reason, why this Article of Salaries may not now be claimed by way of Action.

The Lords found, Prescription can take no Place in any Action of Compt and Reckoning for the saids two Years Intromissions, but that the same may be allowed as Articles in the Discharge: But their Lordships upon hearing Parties next Day, restricted the 100 Lib. Sterling libelled of yearly Salary for the two Years not accounted for, to 800 Merks Yearly.

Aitor Falconer. }
Alter Horn. }

Gibson, Clerk.

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D E C I S I O N XXX.

[19th January 1715.]

M^cDoual of Freuch, and Captain Alexander Stevenson,

A G A I N S T

Sir John Rutherford and his Lady.

IN a Ranking of the Creditors of *Hackburn*, there being produced a Disposition in Favours of *William Cairncross*, (to which *Sir John Rutherford* has Right by Progress) granted by *Hackburn*, of his Lands, &c. under Reversion, and for Security not only of 2495 *Lib.* acknowledged due at granting; and which he obliges himself to pay betwixt and the 8th of *June 1679*, but of all other Sums due by *Hackburn* to him, or which thereafter might be due and addebt to the said *Cairncross*, or whereunto he had Right, or he or his Heirs might thereafter have Right by whatsoever Manner of Way upon which he was Infeft, 3d *January 1675*. There was also produced for *Stevenson* an Heritable Bond and Infeftment, dated 3d *February 1679*, and another Heritable Bond and Infeftment produced for *Fullarton* of *Dreghorn*, dated the same Day with *Cairncross*, viz. the 3d of *January 1679*: Which Infeftment is confirmed in 1689, and is now in the Person of *M^cDoual of Freuch*, who has also procured a Charter of Confirmation of the whole Rights in his Favours.

Stevenson, whose Infeftment was latest, insists in a Poinding of the Ground in *June 1679*, where *Cairncross* and *Dreghorn* compear, and plead Preference upon their Rights; and during the Dependance *Dreghorn* procures his Charter of Confirmation: But *Stevenson's* Right being made publick by his Citation against the Tenants, and the Dependance of the Process before the Confirmation, there is a Decreet in his Favours Extracted upon his Preference.

Cairncross having thereafter by Backbond restricted his above Sum to 1100 *Lib.* does, after the common Debtor was *Lapsus* and Dead, purchase in certain personal Bonds due to other Creditors, and now in the Ranking insists for Preference even as to these also, and that by Reason of the above Clause of Reversion.

It was *Alledged* for the saids other Creditors, That their real Rights having supervened before any Acquisition of the personal Rights, there was a *Medium Impedimentum*, which hindered the Debts Personal at that Time to become Real; specially considering that their Sasines were not only on Record, but Intimate, and *Cairncross's* Right rendered Litigious before his acquiring the personal Debts.

Answered for *Sir John Rutherford*, That his Claim is supported by Law and Form, and all analagous parallel Instances; since there is nothing more usual, than for Parties to give Wadssets Redeemable, for Payment of a special Sum, and of all other Debts which should afterwards be owing before Redemption: Nay, 'tis usual for Parties engaging for one another to take Heritable Bonds of Relief, not only for all undertaken by them, but wherein they should afterwards engage: Which

general Clauses have always before 1696 been found effectual. And there is no *Medium Impedimentum* here, since Sir John's Right was originally Exclusive of the Competitors, who were Certiorate by the Records, that all Sums to which Cairncross might have Right, would certainly exclude them: So that they cannot complain who contracted with a Party so disabled, seeing *Scire debebant Conditionem ejus cum quo contraxerunt*.

Replied for the Creditors, 1mo. That Cairncross's his Right was most suspicious and ensnaring, destructive to Commerce, and tending to render our great Securities by the Registers altogether loose and uncertain: For, by this Clause the Creditors do indeed see that their Debtor owes a certain Sum, whereof they take their Hazard, knowing the Estate will pay both that and theirs, for which they secure themselves by Infestment, and render the same Publick; but what other Sums may be latent betwixt their Debtor and other personal Creditors, no real Creditor can, or is obliged to know. 2do. If such a Clause be sustained, the Debts which could never Claim any Preference, yea Debts not *in rerum Natura*, when other Creditors Rights were existing, should by meer Accident, that another Creditor had a Right in Security with so ample a Clause, through the Coming in that other Creditor's Person, be Transubstantiate, and become Real and Preferable; which is a manifest Absurdity and Injustice, tending to the Overthrow of all our Securities.

Sir Ja. Nasmyth }
for Sir Jo. Rutherford. }
Alt. Graham. }

The Lords Found Cairncross's Right is not preferable for these Debts, which were not in his Person the Time that the other Creditors, Stevenson and Fullarton, their Infestments were made publick.

Robertson, Clerk.

DECISION XXXI.

Eodem Die.

John Gordon Merchant in Rotterdam,

AGAINST

Sir Archibald Campbell of Clunes.

Captain George Campbell grants Bond for 2473 Lib. Scots to John Gordon, wherein he as Principal, and Sir Archibald Campbell and Colin Campbell of Bogholl, as Cautioners, are bound conjunctly and severally. The Bond is dated in May 1704, and payable at *Whitsunday* 1705, and *Martinmas* thereafter, by equal Portions. Gordon and Steuart his Trustee coming to insist against Sir Archibald, for Payment of the Bond *in solidum*.

It was *Answered* for Sir Archibald, That conform to the Act 1695, the Bond was Null as to him the Cautioner, it being more than Seven Years since granting.

Replied for the Pursuers, That the Act could take no Place in this Case, because long after granting the Bond, and after both Terms of Payment were past, Sir Archibald wrote a Letter to Steuart, dated in May 1710, wherein he assures him of Payment against Martinmas then next, and entreats the foresaid Delay: Which Letter, imports a passing

from any Priviledge he could found on, by vertue of the Act of Parliament.

Duplied for Sir *Archibald*, 1^{mo}. That the Bond it self, by elapsing of the 7 Years, is utterly void, and the Cautioner free, unless he be bound by some complete Diligence, or other Deed that can subsist by it self. 2^{do}. The Letter is relative to the Bond, and promises Payment in the Terms of the original Cautionry; which becoming void, the Letter does in the same Manner cease to be binding, as if the Principal had paid the Debt. And it is absurd to imagine, That an Acknowledgment of the Debt in that Manner should perpetuate an Obligation, which Law has made void, upon the Creditors neglecting to do Diligence. 3^{tio}. The Letter is writ 12 Months before the 7 Years expired, and there remained six Months, in which Diligence might have been done after the Term to which the Delay was sought, which excludes all Ground of Suspicion, and justifies the Defenders founding on the Act.

Triplid for the Pursuers, 1^{mo}. That the Letter, if it imports any Thing, does doubtless imply Sir *Archibald's* passing from any Right competent to him as Cautioner, and undertaking the Debt as Principal, and an Obligation on him to pay the Sum, without the Benefit of any Exception that Law might otherwise Indulge him. For if it import any Thing, it must be a Corroborative Security; and certainly a Person Corroborating another's Bond, would not have the Benefit of this Act. 2^{do}. Sir *Archibald* can plead no other Priviledge from the Act, than could be desired by a Person who had become Cautioner in a Bond *ad certum Tempus*; and yet 'tis agreed on by Lawiers, That if such a Person be *in mora intra tempus illud Constitutum*, tho' that Time is elapsed, he will nevertheless continue obliged in the Terms of his Cautionry, *Mora perpetuante Obligationem*: Which is plainly Sir *Archibald's* Case, since the Act of Parliament, allowing Cautioners to be pursued within 7 Years, states them in no better Case than if they had obliged themselves only for 7 Years; therefore Sir *Archibald* having wrote a Letter demanding Delay, and promising Payment, which is plainly to be *in mora*, he perpetuate the Obligation, and continues bound, notwithstanding the 7 Years are elapsed.

Actor Geo. Mackenzie. }
Alter Dun. Forbes. }

The Lords Found the 7 Years Prescription by the Act of Parliament 1695 doth in this Case run, not from the Date of the Bond, but from the Date of the Letter.

Mackenzie, Clerk.

DECISION XXXII.

Eodem Die.

The Magistrates and Council of Peebles,

AGAINST

Murray of Cringilty Younger.

DURING the Dependance of a Declarator of Commonty at Cringilty's Instance, against the Magistrates and Council of Peebles, for declaring his Right of Commonty upon the Lands of Hamilton, there being a Complaint given in by the Magistrates of Battery, committed

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mitted by *Cringiltie* upon the Person of one *Wylie* a Weaver, Burgefs of the faid Town.

It was *Answered* for *Cringilty*, That the Complaint in no Manner fell under the Act of Parliament, becaufe *Wylie* was neither Purfuer nor Defender in the Caufe; the Act (which is 19. Parl. 14. Ja. VI.) bearing precisely, *Gif it fall happen, either the Defender or Perfuer to flae or wound to the Effufion of Blood, or otherwayes to invade ane of them ane other.* By which it is plain, that none can come under that Act but either Purfuers or Defenders, and who are *Nominatim* as fuch in the Summons; for fo it further bears, *After the raising of Summonds or Precepts, and lawful Execution thereof:* So that Purfuers and Defenders Names must be both in Summons and Execution, and it is their Persons only that are protected by the fpecial Guard of the Law. 2do. The Statute is to a high Degree Penal, and therefore ftrictly to be Interpreted: And to alledge, That by citing of Magiftrates, every Burgefs is virtually cited, is indeed to bring on a heavy Penalty by Implication, contrary to the Nature of all Punifhments of Crimes.

Replied for the Complainers, That *Wylie* being a Burgefs, and having Houfes in the Town, is as properly a Defender in this prefent principal Procefs as any other; nor are the Provost and Counfellors conveyened in this Procefs, under any other Quality but as Co-burgeffes: And *Wylie* is not only *Virtually*, but in a Manner *Nominatim* cited, the Council being cited as representing the Community, whereof *Wylie* is one; fo that he is really *Nominatim* cited, feeing *constat de Persona*.

Duplied for the Defender, 1mo. That however every Burgefs has a Confequential Interest in that which belongs to the Community, yet certainly the direct Right belongs to the Collective Body represented by the Magiftrates; but every particular Burgefs is under a diftinct Consideration from the Collective Body: And therefore, if the Community be Purfuer or Defender, it does not follow that every Burgefs is fo too; and therefore cannot be brought under Penal Laws, which concern Purfuer or Defender as fuch: For if this were, then every Burgefs must be cited in Actions purfued againft a Town, which was never faid. 2do. If this were fufained, there could be no Equality in the Cafe: For it cannot with any Reason be alledged, That if *Wylie*, who is not called, had been the Aggreffor, that therefore he made the Community lofe the Plea; which fhowes, that really in the Cafe of a Community there are hardly *habile Terms* for this Act of Parliament. 3tio. The *Argumentum ab incommodo* is invincible; for this fhould oblige every Perfon that has an Action againft a Community to know every particular Member, and every Purfuer to know all Persons who may claim any remote and confequential Interest in the Caufe.

Attor Sir W'al. }
Pringle. Alter }
Sir Ja. Nasmyth. }

The Lords found the Complaint not relevant to infer the Penalty of the Act of Parliament anent Batteries during the Dependance of a Procefs; and therefore affoillied from the Complaint.

Alexander, Clerk.

D E.

DECISION XXXIII.

[21st January 1715.]

David Couper Maltman in Perth,

AGAINST

The Sheriff-Depute of Perth.

A Complaint being given in to the Lords by *David Couper*, shewing, That he being pursued before the Sheriff of *Perth*, and having presented a Sift upon a Bill of *Advocation* before any Interlocutor signed in the Cause, yet the Sheriff-Depute refused to stop Procedure.

Answered for the Sheriff. *1mo.* That the Interlocutor was pronounced before intimating the Sift; and the signing of Interlocutors is no new Judicial Act, since it may be done out of Court. *2do.* 'Tis known to be the Custom of all Inferior Judges, to decline admitting Advocations after Sentence, whether signed or not. *3tio.* It being the last Session Day, the Court was up some Time before, and the Bill presented in the Clerk's Chamber, when the Depute was examining Witnesses. *4to.* All produced was a Sift, before the Expiration whereof the Interlocutor was not signed; and tho' done thereafter, it was warrantable, unless the expedite Advocation had been intimate before signing the Interlocutor.

Replied for the Complainer to the *First*, That tho' the pronouncing Sentence is the Act of the Judge, yet it is not Act or Sentence till 'tis writ out by the Clerk, and signed by the Judge, since *Forma dat esse Rei*: Thus 15th December 1708, *Houston* contra Lord *Ross*, a Decreet in Absence of the *Admiral* was found Null, because not signed, tho' by the Custom of that Court such were not in use to be signed, but only entred into the Diet Book: And therefore the Act of the Judge being intrinsically Null when the Advocation was presented, it was unwarrantable to cause write out and sign the Interlocutor; which was the Thing that gave Being to the Sentence, and therefore inferred Contempt. To the *Second*, That the Custom of Court ought not to free the Sheriff from Damage and Expence, tho' it may free him from a Fine. For every Man is liable in Reparation, when his Fact occasions the Damage, whether the same be Culpable or not, and that upon the Head of Natural Equity, as in the Case of *Lex Aquilia*. To the *Third*, That it appears by the Instrument produced, that the Advocation was intimate the same Day the Decreet was pronounced, while the Sheriff was sitting in Judgment. And whether this was a second Diet of the Court sitting the same Day, or a Continuance of the former *Sederunt* in which the Decreet was pronounced, does not import; for at Presenting, the Interlocutor was neither writ out by the Clerk, nor signed by the Judge. To the *Fourth*, That, *1mo.* The Contempt was in not admitting the *Advocation* when presented. *2do.* The *Advocation* being presented the last Day of Court, the signing the Interlocutor in the Vacance was an Aggravation of the Contempt. *3tio.* The Decreet bears Date the same Day whereon the *Advocation* was presented; nor was the Deliverance signed

signed before Presenting ; and the Presumption being that it was signed the same Day, it follows it was signed after Presenting.

A^dor Graham. }
Alter Fleming. }

The Lords Found it unwarrantable in the Sheriff to have refused the Sift of Advocation, tho' it was presented only in the Afternoon of the last Day of his Sitting, the Sheriff and his Clerk being then Officiating : But sustained the Answer, That the Sift expired before subscribing the Sentence, sufficient to free the Sheriff from any further Penalty than the Expence of the Complaint.

DECISION XXXIV.

Eodem Die.

Colonel John Erskine,

AGAINST

Sir George Hamilton.

IN the Competition betwixt these Parties about the Lands of Tulliallan, the Lords having, by Interlocutor of the 17th of February 1714, (which is marked with the whole State of the Case in the printed Journal of that Session) Found Sir George Hamilton's Possession ascribable to the Preference in the Decreet 1682, grounded on the Earl of Kincardin's Disposition in 1678, until Sir George founded on his other Rights to support that Disposition, and that he did found on his other Rights for supporting that Disposition in the Month of July 1701 ; and therefore found him accountable since the said Month of July 1701, and that his Possession and Intromission ought to be imputed to extinguish the saids separate Rights accordingly. Upon a Reclaiming Bill given in this Day by Sir George, and Answers for the Colonel,

Ro. Dundas for }
Colonel Erskine. }
Alter Graham. }

The Lords Adhered to the former Interlocutors and Deliverances, finding Sir George accountable for his Intromissions since the Month of July 1701, ad hunc effectum only, for extinguishing his Rights, but not for Repetition of Superintromissions ; and refused the Desire of the Petition accordingly.

Mackenzie, Clerk.

DECISION XXXV.

Eodem Die.

William Young in Alloa,

AGAINST

Margaret Irvine, and John Anderson her Husband.

A Contract of Marriage in common Form having past betwixt the saids Parties, (the Woman being in Familia of her Father) and a Penalty of 100. Lib. Scots adjected thereto ; the Woman nevertheless Marries

Marries another Person, whereupon the Man insists for the Penalty against her and her Husband.

Answered, That this Contract imported no more but a Resolution, which *re integra* may be receded from; specially since *Matrimonia debent esse Libera*. 2do. She being a Child in *Familia*, the Contract was *contra bonos Mores*. 3tio. No Diligence is competent here for implementing the principal Contract, far less then for the Penalty, since *accessorium sequitur suum Principale*.

Replied 1mo. That the Contract was an actual Obligation to Solemnize, and the Penalty comes in Place of Performance, to which the Pursuer has Right *Nomine Damni*, and *Nemini admittendum est Consilium mutare in alterius prejudicium*. 2do. The Contract bears, That she is obliged to Marry with Consent of her Parents. 3tio. In the like Case, *Margaret Jamison contra Robert Sheriff*, The Lords decerned for the Penalty.

Duplied, That since *Res* is still *integra*, no Penalty in such a Case can be insisted for; since that were to act in *fraudem Legis*. 2do. As to the Decision founded on, there was no Decision as to the Contract it self, but only as to the Designation of the Writer and Witnesses, as is evident from *Forbes's Collections*.

The Lords Found the Answers and Duply relevant to Elide the Libel and Reply; and therefore Assoillied the Defenders.

Robertson, Clerk.

DECISION XXXVI.

Eodem Die.

Catharine Wardlaw and her Husband,

AGAINST

Sir George Maxwell of Orchardtown, and Maxwell of Cuill.

THE deceast *Jean Wardlaw*, at her Marriage with the deceast *Maxwell of Cuill*, gets an Obligation from *Orchardtoun*, and another from her Husband, to pay her 20 *Lib. Sterl.* apiece Yearly after her said Husband's Death; and she surviving him, makes a Testament in *Ireland*, leaving the Bygones of these Annuities to *Catharine Wardlaw*; and the *Probate* of the Testament bears it to have been subscribed in Presence of Three Witnesses, whereof Two are Women, One of whom subscribes by initial Letters only.

Catharine coming to pursue the Representatives of *Orchardtoun* and *Cuill*, it was *Alledged* for them, That the Testament was Null, as to any Effect in *Scotland*. 1mo. Because Women cannot be sustained Witnesses in *Scotland*; yea, *non constat* that they are sustained in *England*. 2do. Because the principal Testament was not produced, but only an *Irish* Writ of Administration, which is not subscribed by any Person.

Answered for the Pursuers to the First, That the Law and Custom of each Place must regulate, as to the Solemnities requisite in Subscribing,

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bing, at least with respect to Moveables; and that such is the Custom of *England* is notour, and needs no Probation. To the *Second*, That the Testament produced was Authentick, from the Records of the Diocess where the principal Testament was *probated*; which was all that possibly could be had in this Case, since the principal Testament behooved to be probated in *Ireland*, and must ly as a Warrant for the Probat in the Clerk's Hands: So that the Pursuers behooved either to quit their Claims in *Ireland*, or leave the Principal there. But the Probat produced having the Seal of the Office appended, and being attested by the Clerk, as our *Safines* are commonly attested by Notars; it has all the Requisites of a formal probated Writ.

Replied for the Defenders, That tho' it were probative, yet it cannot be a Title in *Scotland*, unless the Pursuers had applied for a Confirmation of the Goods in *Scotland*, as the Lords found, 25th *February* 1637, *Rob contra French*.

Duplied for the Pursuers, That tho' this were true as to Administrations *ab intestato*, which can indeed go no further than the Jurisdiction of the Granter; yet the Administration here proceeding upon the Defunct's Testament, it may be confirmed in any Judicature, with respect to all the Defunct's Goods. This, in the Case 16th *February* 1627, *Lawson contra Kello*, the Lords sustained Action at the Instance of *Lawson*, upon the Title of Executrix, Nominate by her Husband in a Testament confirmed at *London*. And as to the Decision objected, the Speciality thereof was, That the Executrix confirmed in *England* was compearing, and renounced to be Executrix; and therefore the Lords found Necessity of a new Confirmation.

Astor Boswel. }
Alter Ha. }

The Lords sustained the Testament Libelled on, as a sufficient Title in this Process, the Pursuers confirming before Extract.

Dalrymple, Clerk.

DECISION XXXVII.

Eodem Die.

Dundas of Brestmiln,

AGAINST

The Representatives of *Murray of Skirling*.

IN this Process, as remarked 14th *December* 1714, *Brestmiln* now founds upon another Clause in the Contract 1662, subsequent to the Clause irritant, viz. That if the Price to be obtained therefore extend to more than the restricted Sums of the Creditors, and the Annualrents for the Time, (viz. of the Sale) then the Superplus of the Price is to be applied to Sir James's other Creditors. And alledged, That the Design plainly was, in case the Redemption should not be used, then the Lands should be sold by the Creditors, and the Price applied for their Payments in the first Place, and the Superplus for Sir James's other Creditors: But

not, that these Creditors by vertue of their expired Legals, should carry off the Estate, or whole Price thereof, more than satisfied their Debts.

Answered for the Representatives, That that Provision was only in case Sir James made use of the Power given him by that Contract, *i. e.* should sell the Lands within the Four Years; and by his not making use of that Power, the Creditors only returned to their own Place, but did not get an expresse Title to sell; for that they needed not: So that the Clause was only calculat for the Event, in case Sir James should sell the Land himself. Nay, Otherwise this were to make the Contract have Effect after it is Void and Null, it being incongruous to say, that it should be Void and Null as to all Effects betwixt Skirling and the Contractors, and yet stand effectual as to the Creditors not contracting.

Replied for the Pursuer, That by the Clause irritant, the Contract is not to be Null, since it only says, (*That then and in that Case this present Reversion shall expire and be Void, &c.*) but the Effect of the Irritancy is, That the Reversion was to be Null, and that the Creditors were to have Power to sell, and the Contract to subsist as a Discharge of the Reversion in Favours of the Creditors Contractors, and as an Obligation upon them, to apply the Superplus of the Price in Favours of the other Creditors.

The Lords, in Consideration of the above Clause in the Contract 1662, subsequent to the Clause, irritant, found, That Brestmiln, by vertue thereof, hath Right to affect the Superplus Price in the Hands of Lieutenant General Douglass his Heirs, after the restricted Sums in the Contract are satisfied and paid; together with the Annualrents of the same.

Dalrymple, Clerk.

Ador Robert Dun- }
 do. Alor Sir James }
 Nismyth & Spotswood. }

DECISION XXXVIII.

Eodem Die.

James Hamilton Writer in Edinburgh,

AGAINST

The Creditors of Orbiston, and Hamilton of Dalziel.

Walkinshaw having disposed in Favours of the Deceast Sir James Hamilton, which faillicing by Decease, to the deceast William Hamilton of Orbiston his eldest Son, an Apprising of the Estate of Orbiston; Sir James having deceased before William, and James Hamilton the second Son being to serve Heir to his Father Sir James, there were Objections made against the Service by the Laird of Dalziel, and the other Creditors of William, and the Creditors of James Hamilton the Son of William also Deceast, as being jealous, that by such a Service all the Debts contracted by William would fall to the Ground, and all Diligence done against him be unhinged. The Question being therefore, Whether the Estate Disposed by Walkinshaw, was after the Decease of Sir James, vested in the Person of William his Son, without the Necessity of a Service? And if William was Fiar? Or if the Estate was *in hereditate jacente* of Sir James?

It was *Alledged* for Dalziel and the Creditors, *imo.* That Since William, by the Substitution and his Survivance, and using the Disposition,

became to have the Right and Benefit of the Disposition settled in his Person, it was sufficient to exclude the Service; because, if the Disposition belonged to *William*, there could be no Service as Heir of Provision to any other but to him therein; and consequently the Service prest by the Pursuer as Heir of Provision to Sir *James* in that Right, could not take Place. 2do. In case of Substitution in personal Bonds, the Right, without any Confirmation, belongs to the substitute; and tho' there be not a *par ratio*, where *Safine* has been in the Person of the first Acquirer, yet where the Right has remained but a personal Right in the first Acquirer (as this Disposition did with Sir *James*) the Parity of Reason should make the same Law in personal Rights, as in moveable Debts. 3tio. If it should be supposed the Disposition contained Assignment to the Mails and Duties to Sir *James*, and after his Decease to *William*; Or an Obligment of Warrandice to Sir *James*, and after his Decease to *William*; then doubtless *William*, after his Father's Decease, could without Service have pursued for Mails and Duties, or charged on the Warrandice if incurred. Or if *Walkinshaw* had granted an Obligement to renew the Disposition to Sir *James*, and after his Decease to *William*, certainly *William* would have had Access to a summar Charge on such an Obligment without a Service; and if in such Cases *William* would have had a direct Interest without a Service, there can be no Speciality that could oblige him to have a Service before he can use the Precepts and Procuratory; for it being a Right, he must either be Fiar of All, or Fiar in no Part.

Answered for *James Hamilton*, 1mo. That Sir *James* being the only Fiar and principal Contracter, and *William* only a Substitute to him, the Right could not be fully established in the Person of *William* without a Service; consequently it remained in *Hereditate jacente* of Sir *James*, and so might be carried by his surviving Sons Service to him. 2do. No Argument can be drawn from Bonds to Rights of Lands; for tho' for the Ease of Creditors, and the small Consequence of such Rights, and their being designed to be but Temporary, Custom hath introduced that Bonds should be transmitted without any Necessity of a Service; yet it's otherwise in Land Rights, which are framed to endure to Perpetuity, and to stand on Record. Besides, That both Superior and Vassal having considerable Interests, these could not be distinguished nor kept clear, if the Progress were not very distinct in the Writ; Whereas in Bonds, the Superior, even where Infeftment is taken, has very little Interest. 3tio. Without a Service *William* could have had Right to none of these things: Because Obligments of Warrandice, and Obligments to renew Dispositions of Lands, are but a kind of Accessories, and are inseparable from the principal Right, and so must be transmitted the same way, unless such Obligments be on separate Writs: But then it will make nothing to the present Purpose, because such Obligments make no Part of the Conveyance of Land Rights, nor are subservient to connect the Progress.

It was further Alledged for the Creditors, That there was no Necessity for *William* to have been served in order to constitute him Fiar after his Father's Decease; because the Propinquity is instructed by the Right it self, and so needed not be cognosced.

Answered for the Pursuer, 1mo. That the Propinquity is likewise ascertained in all Substitutions, where the Substitutes are *Nominatim* called, sup-

supposing there were 15. Degrees; for the Propinquity of the last, is just as much instructed as of the First, where all *Nominatim* called, and nothing falls to be Cognosced but the Faillure. And there's no Reason why the Faillure of 14. must be cognosced more than the Faillure of One: Besides, That the Service is a Solemnity, and *Modus adeundi*, which Law has fixed upon: And there is something more to be Cognosced than the Propinquity and Faillure.

Actor Robert Dundas. Alter Boswell.

The Lords Found, That the Estate disponed by Walkinshaw, was not after the Decease of Sir James Hamilton, fully vested and settled in the Person of the Deceast William Hamilton, without the Necessity of a Service; and therefore allowed James Hamilton the Pursuer his Service to be retoured, with this Provision, that before retouring, the said James Hamilton gave an Obligation, to the following Import, viz. That notwithstanding of his said Service, the Estate of Orbiston, and what else he can succeed to by vertue of the said Service, shall be lyable and subject according to the Extent and Value thereof, to all the true and lawful Debts and Deeds of William Hamilton his Brother elder of Orbiston, and James Hamilton Younger thereof his Nephew; and to the Diligence thereon, except the Gratuitous or Death-bed-debts, Debts or Writs granted in Favours of James Hamilton of Dalziel.

Robertson Clerk.

DECISION XXXIX.

[22d. January 1715.]

Mr. John Fergusson Minister at Aberbrothwick,

AGAINST

The Magistrates and Council thereof.

THE said Minister ever having been in use since his Admission in anno 1699, and his Predecessors for many Years before, to get Payment of 80. Merks from the Town, for his House Rent; Upon their withdrawing Payment in 1712, intents Process against them therefore: Where

It was *Answered* for the Defender, That tho' out of personal Kindness they had paid to the Pursuer and his Predecessor the Sum libelled, yet there was nothing could compel them thereto, and his Possession was but *precarious*, and without any Title, since by the *Decreet of Plat* the Town is neither burdened with Gleib or Manse, and the greatest Part of the Lands, in and about the Town, being *Abbot Lands*. The Act of Parliament James Sixth Parl. 12. Act 16. burdens the *Abbot Lands* with Gleib and Manse, where there was none formerly, before they can come to the Towns Burrow-roads, which is all their concern in the Place.

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Replied for the Pursuer, That Thirteen Years Possession being acknowledged by the Defenders; the same is a sufficient Title for things of that Nature; it being truly a Part of the Minister Stipend.

Actor Robert }
Dundas. Alter }
Horn.

The Lords Found, That the Pursuer proving his and his Predecessors Possession, and being in Use to receive from the Town yearly the Sum libelled, as the Stipend and Rent of a House or Manse to him, and them, as Ministers of the Town, for more than Thirteen Years, subjected the Town in Payment thereof for Bygones, and in Time coming.

Alexander, Clerk.

DECISION XL.

[25th January 1715.]

Robert Allan Merchant in Edinburgh,

AGAINST

The Earl of Lauderdale.

RObert Allan having Right by Progress, to a Debt due by the Deceased Duke of Lauderdale, pursues the present Earl as Heir Male and of Taillie by Progress to the said Duke, for Payment.

It was *Excepted* for the Earl, That he being only pursued as Heir Male and of Provision, the Duke of Lauderdale Heir of Line, ought to be first discussed.

Answered for the Pursuer, That the Benefit only took Place, where the Heir of Intail could condescend upon the Heritage that fell to the Heir of Line, and which might be reached by Diligence.

Replied for the Earl, That he could not so condescend, yet the Heir of Line ought to be discussed: Because, it's the Privilege of an Heir Male or of Taillie, that he is but liable *secundario* or *in subsidium*, and cannot be attacked for the Predecessor's Debt, except in the Event that the Creditor cannot recover Payment from the Heir of Line; who is the Universal Successor. Now altho' there were nothing to which the Heir of Line could succeed; yet if he represent by Service, (which oftentimes happens when there is no Estate) or by Behaviour, or if he suffer a Decreet to go against him when Law fully charged; without renouncing: In all these Cases he is liable to the Creditors, and must pay their Debts, tho' he should not have a Six-pence by the Defunct; therefore the Heir of Line ought still to be discussed, tho' no Estate were condescended on, to which the Heir of Line could succeed.

Duplied for the Pursuer, That if the Order of Discussing were required, even when no Heritage is condescended on, to which the anterior Heir might succeed, then Creditors should be put to unnecessary Delay, Trouble and Expence, if in the Event there is nothing to be affected, to which the Heir of Line could succeed, and the Priviledge Law gives to the Heir Male, is still upon the Supposition, that is there a Subject which may be affected, the very Import of the Word (*Discussing*) implying it: For to discuss, is not only to procure a personal, but to affect a Subject according to the Nature of it; and where there is none such to be

be condescended on, 'tis impossible this Discussing can take Place. And of this Opinion is the Lord *Stair*, § 21. *Tit. Heirs*, where he positively asserts the Exception of the Order of Discussing, will not be sustained, unless the Defender condescend on an Heritage, to which the anterior Heir might succeed.

Triplied for the Defender, That there is this other Reason for Discussing the Heir of Line, that he being the universal Successor, and the Heir of Provision, with respect to him, *quodammodo* a Creditor, the Heir of Line is presumed in Law to have the Instructions of the Payment of the Debt, if any be; and likewise to know the Objections or Defences that may be competent against the Debt, which the Heir of Provision is not presumed to know, where there is an Heir of Line either Entred or that may Enter; and the Heir of Line in such Cases is always held to Represent, until he Renounce.

Quadrupled for the Pursuer, That that is not the Reason of Discussing; the true Reason lying in the Prerogative of the Heir-Male, 'Taillies being understood to be made for the Preservation of Families, and they are accounted as Creditors, with regard to the Heir of Line: And as when the Heir of Line had renounced all, and that there was a total and universal Taillie, he is not presumed to have the Keeping of the Writs, so this is alwise supplied by a Diligence of Exhibition, if the Heir-Male think fit to seek it; and the Benefit of Discussing competent to a Cautioner is not founded upon this, That the Principal is presumed to be Master of the Instructions of Payment, and to know best the Defences against the Debt: But is founded upon the Nature of a Cautioner's Stipulation, *qui pro alio fide-jubet*; and so is only subsidiarily liable, and he may renounce the Benefit.

As for Sir Wat.
Pringle. Alter
Ro. Dundas.

The Lords sustained the Condescendance of an Estate to which the Heir of Line may succeed.

Mackenzie, Clerk.

DECISION XLI.

Eodem Die.

Houston Younger of That-Ilk and his Lady,

AGAINST

Sir John Shaw of Greenock.

THE now Sir John Shaw standing publicly Infeft in the Fee of the Lands of Greenock, without any Restriction, in Anno 1686, he and the deceast Sir John his Father, in March 1700, in a Contract of Marriage do jointly make a Taillie of their Estate, and grant Procuratory for Resigning the same in Favours of Sir John Younger, and the Heirs-Male to be procreate of the Marriage; which failing, to his younger Brothers *successive*; which failing, to Mrs. Margaret Shaw Pursuer, and her Heirs, &c. There are also prohibitory and irritant Clauses, *De non alienando*, & *non contrahendo Debitum*: Which Contract is

Recorded in the Register of Taillies. The younger Brothers having deceased without Issue, and the Pursuer standing next in the Taillie, pursues for Exhibition thereof, that the same may be Recorded in the Books of Session for Preservation of the Principal, because Principals are not left in the Register of Taillies.

Alledged for the Pursuers, That whoever has Interest in a Writ, whether Immediate or Remote, has Interest in the Preservation of it, and for that Purpose may have it Judicially Exhibit, and put into the Publick Repository: Nay, this might be urged even in a simple Substitution, tho' alterable by the Fiar; for it is not enough to say the Writ may be Revoked, *ergo* it ought not to be Exhibit, for the very Way of proponing that, shows it is still a subsisting Writ: But in the present Case the Rule is more firmly established, where the Heirs of Entail are only Liferenters; and if Sir John have the absolute Power of disposing of it, the Exhibition and Registration will not in the least diminish his Right; specially since it's already published by his own Deed: So that it is not like an undelivered Writ. This is founded in the Civil Law, where the Remoteness of the Right does not hinder this Interest; for every Conditional Right not purify'd, is a remote Right: But so it is, that by the Common Law, All Substitutes, Legatars, *Fide Commissarii*, &c. Yea, they who were such *sub Conditione tantum*, had Right to this Action, and for which the *Prætor* propos'd a special Interdict, *De Tabb. exhibend.* and is further cleared from *L. 2. Pr. ff. Quemad. Test. aper. Tabularum Testamenti Instrumentum non est unius hominis h. e. heredis, sed universorum quibus quid illic adscriptum.* Yea, in *L. 1. § 5. § 11. ff. de Tabb. exhib.* it is expressly said, That *Interdictum de Tabulis exhibendis ad omnem omnino scripturam Testamenti sive perfectam, sive imperfectam, etiam deletam, pertinet*; and a remote Heir substitute is like a *Heres*, or *Legatarius sub Conditione*. And thus 'tis said in *L. 3. § 14. ff. De Tabb. Exhib. § si sub Conditione legatum sit, quasi conditione existente sic estimandum est; nec compelli debet, ut se restitutum caveat quicquid consecutus est, si conditio defecerit.* By which, notwithstanding the Condition, he had the *Interdict* competent to him for Exhibition. The like in our Practice where there is no immediate Right, but a *Spes* only: As in the Case of a Tutor in Law against a Tutor-dative, who was in the Possession of the Pupil's Writs, 15th December 1664, *Fork contra Loudon*; where the Reason is given, *viz.* That it might not be in the Power of the other to Embazle. As also in the Case of a personal Creditor, observed by *Spotiswood*, 3d July 1635. who, in order to an Apprising, was allowed to pursue Exhibition of an Heritable Bond due to the Debitor.

Answered for the Defender, *imo.* That he was neither bound to Exhibit nor Registrate his own Writ, unless the Lords should find, That the Pursuers have a sufficient Interest to insist in such an Action: For in every Exhibition the Defender is allowed in the first Place to dispute the *Jus persequendi*, before he can be decerned to take a Day to Exhibit; and the very Nature of the Thing requires it, otherwise Sentence would pass in the Conclusion, without allowing Parties to examine the Premises. 2do. The ordinary Case of Decerning to Exhibit, reserving against Delivery, is, where there may be some Doubt concerning the Nature and Circumstances of the Writ: But here the Pursuers Libel upon a Writ of a

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particular Tenor, and the Defender admitting the Tenor to be as Libelled, says, he cannot be compelled to Exhibit, far less to Register. 3^{tio}. The Defender founds on the Nature of Property, and therefore the Writ called for being his proper Evident, he cannot be compelled to do any Thing in relation to his own Property (of which he is *Liber Moderator & Arbiter*) at the Instance of a Party, who does not (in this Argument) say that he has no Power to dispose on the Subject at his Pleasure. 4^{to}. *Actio est jus persequendi in judicio quod nobis Debetur*; therefore the Pursuer's Title must appear before an Action can be sustained, particularly in case of Exhibitions. Thus L. 19. ff. *ad exhib.* *Sed quidam Consuluit, an possit efficere hac actio ut rationes adversarii sibi exhiberentur, quas exhiberi magni ejus interesse est.* Respondet, *Non oportere jus civile calumniari, neque verba captari, sed, qua mente quid diceretur animadvertere convenire.* Whence 'tis plain that Men are not to be disturbed in their Possessions or Property, but where there is a peculiar Title. As to the *Interdict de Tab. exhib.* that *Interdict* concerns not the Law of Scotland; for with us there is no such Recognition, nor Solemnity of Seals to Subscriptions required, as gave Rise to that *Interdict* anent Testaments among the Romans. Besides, that the *Interdict* relates to Writs only that have been left by a Person deceased. But this Action is like Exhibition of a Testament while the Testator lives.

Replied for the Pursuers, That the Cases widely differ; for a Testament, while the Testator lives, has no Being, has conveyed no Right; whereas a Contract of Taillie Register, has once given a Right, revokeable or not, is not the Question. And as to the Things being the Defender's Property, &c. these are *Jura* or *Exceptiones differendæ in directum judicium*, (i. e. the Pursuer's special Conclusion) *re interim exhiberi jussa*, L. 13. § 13. ff. *ad exhib.* And as to the other Laws cited, the Pursuer's Interest is evident and still permanent, and must be so, *hac lite pendente*, during which Time the Defender can innovate nothing to their Prejudice; since *tenetur & qui Dolo desit possidere*; whether their Title be so strong as to force the Registration, is a Question only disputable after Exhibiting. The Pursuer's Interest being clear, the Reasons for exhibiting the Principal are, 1^{mo}. That the Extract from the Record of Taillies does not answer the Intent of this Action, because the same cannot satisfy in an Improbation; and every Person that has Interest in a Writ, has Interest to be so Master of that Principal, as might answer any such Process if intended. 2^{do}. Another Reason is, The Difficulty of making up Tenors if it should be lost, and the Pursuers prevail in this principal Process; nor matters it tho' they give no Reasons of their Fear of an Improbation, or losing the Paper, since *prestat intacta jura servare quam post vulneratam causam remedium querere*. 3^{tio}. A Third Reason is, That the only Remedy of proving the Tenor in such Cases, viz. Instrumentary Witnesses, &c. may be disappointed.

The Lords Found the Defender ought to Exhibit, reserving all Defences against the Registration, or to any other Legal Effect, as accords.

Mackenzie, Clerk.

For Sir Walter Pringle, &c. Alter Hugh Dalrymple, &c.

D E C I S I O N XLII.

Eodem Die.

Mr. Alexander Seton Chyrurgion,

A G A I N S T

Sir Alexander Seton of Pitmedden, his Father.

John Hamilton, as Assigney on Trust by *John Seton*, pursues Mr. *Alexander Auchmoutie* for 10000 Lib. Scots, for which *Auchmoutie* had obtained a Wadset of Part of the Estate of *Fyvie* in his own Name; *Hamilton*, by his Backbond, was obliged to Denude in Favours of *John Seton* and the Heirs of his Body, which failing, to *Pitmedden* and the Heirs of his Body. Thereafter, by a Contract betwixt the said *John Seton*, with Consent of *Pitmedden*, for any Right he had by being substitute Heir, on the one Part, and *Auchmoutie* on the other Part; *Auchmoutie* obliges himself to dispoise the Wadset in Favours of *John Seton*, and the Heirs of his Body; which failing, in Favours of any of *Pitmedden's* Children, *Pitmedden* himself should Nominate; and failing of such a Nomination, to *Pitmedden* and his nearest Heirs whatsoever: With a Clause, restricting the 10000 Lib. to 10000 Merks, in case *Pitmedden* or his Children should succeed. In Prosecution of this Agreement, *Pitmedden* nominates the said *Alexander Seton* his Third Son, with these Reservations, 1mo. That the Annualrent during *Alexander's* Minority should belong to the Father. 2do. That the Father should have Power without the Son to transact the Wadset; and the Son, by vertue of the Nomination, was served Heir of Provision to *John Seton*, but the Retour carries to be with the Burden of the Clauses and Conditions contained in the Designation whereupon it proceeded. *Pitmedden* thereafter enters into a Submission concerning the said Debt, with the Duke of Gordon, to the Lord *Fountainhall*; who by his Decreet-arbitral, deerns *Pitmedden* and his Son to dispoise to the Duke the said Right on *Dumfermling's* Estate, and the Duke to grant Security for 1000 Lib. Sterling to *Pitmedden* in Liferent, and his said Son *Alexander* in Fee, in so far as extended to 10000 Merks, and the rest payable to such other of *Pitmedden's* Children as he should condescend on, with what Qualities and Restrictions he should think fit. And both Father and Son accordingly grant a Disposition of the Right, and *Alexander* after Majority Ratifies the same; the Question arising, Whether *Pitmedden*, by the Nature of his Grant, as having such an Interest himself, might not only Name such of his Sons as he pleased, but under such Qualities and Restrictions as he thought fit.

It was Alledged for the Son the Pursuer, That by the Contract betwixt *John Seton* and *Auchmouty*, *Pitmedden* had no real Interest in the Sum it self, but only the Faculty of Nomination or Choice of one of his Children; So that any of the Children whom he should Name, were immediatly substitute to the failing of Heirs of *John Seton's* Body. 2do. By the Retour, the Pursuer is simply served Heir of Provision to *John Seton*, both as to Principal, Annualrent, and Penalty, which was procured

cured by *Pitmedden* himself. 3^{tio}. Whatever way he did qualify his Nomination, which was a Deed of his own, yet he could not do the same contrary to *John Seton's* Destination.

Answered for the Defender, That the *Peculium* was not *adventitium*, but *profectitium*, because procured from *John Seton* by the Father for good Services done: Besides, That he had educated his Son, which he was not obliged to do to a Son who had 10000 *Merks*. To the *Second* and *Third Answered*, 1^{mo}. That the Decreet Arbitral is homologate by the Pursuers implementing it. 2^{do}. The Retour bears, to be at the Burden of the Conditions in the Designation whereon it proceeded; and the Designation containing the above Clauses is narrated in the Disposition made by the Pursuer and his Father to the Duke: Which Conditions so narrated in the homologate Disposition, and in the Retour relating thereto, can never hereafter be quarrelled, for not being contained in the Contract with *Auchmouty*. Besides, That *John Hamilton* had *John Seton's* Right standing in his Person, when he denuded himself of the Trust, and therefore might very well affect the Right whereby he denuded with a Reservation of the Annualrents to *Pitmedden*.

Adv. Sir Walter Pringle, Alter Horn.

The Lords Found, That the Lord *Pitmedden*, had not only a Power to make the Nomination of any of his Sons he pleased, but likewise that he had sufficient Right and Interest to qualify that Nomination.

Mackenzie, Clerk.

DECISION XLIII.

[26th January 1715.]

Broun of Mollance,

AGAINST

The Viscountess of *Kenmure*, and others.

THE Viscountess of *Kenmure*, being infeft in Liferent in the Lands of *Greenlaw*, alledged by *Mollance* to be within his Barrony of *Corsepatrick*; and having begun to build a Corn-mill on the saids Lands, which might be prejudicial to *Mollances* Barron-mill there, he raises a Suspension for stoping the said Building, which was duly intimate to her Ladiship, the Workmen, Overseers, &c. The Viscountess having nevertheless proceeded to compleat the Mill; *Mollance* gives in a Complaint against her Ladiship, for Contempt of the Lords Authority, concluding the Demolition or Stoping of the Mill, Damage, Interest, &c.

Answered, 1^{mo}. That it was not proven she did transgress the Lords Authority, the Probation only being, that she agreed for the Building of the Mill, and that Part of the Mill was finished after the Time of the Suspension, but it was not proven that she did order the Continuance of the Building, and it was very possible the Servants might continue the Work without her Knowledge. 2^{do}. *Esto* she had known of the Continuance, yet she cannot be lyable to *Mollance* for any Penalty, because he yet had proven no Interest he had to quarrel the Building; and least of all could he crave the Demolition of the Fabrick, or stoping the Mills.

Mills-going : Because the Heritor, who has now a Right to what's built on his Ground, is not called. And the civil Law had such regard to the Preservation of any Building (much more to a Mill) that it did not so much as allow *solvere tignum furtivum adibus, aut vineis junctum, Neque vindicare, quod providenter, Lex effecit, nevel adificia sub hoc pretextu, Diruantur vel vinearum culturam turbetur.*

Replied for the Complainer, As to the Defence of not ordering the Continuance, That the Alledgance was irrelevant, it being proven that my Lady caused build the Mill, agreed with the Workmen, carried on the Work in her own Name, &c. and that the Suspension was duly intimate both to her and them ; Who answered the Notar, That they were but Servants, and what they did was by her Ladyship's Command : All which, (in Answer to the Alledgance anent the Heritors not being called) is more then sufficient to infer the Conclusion of the Complaint, tho' others had Right to the Property of the Mill, since they were at no Expences in the Building ; nor in any worse Case by demolishing that Part of the Mill built after the Intimation, than they would have been in, had the Suspension not been intimate : However an Intimation to the Workmen was sufficient, as appears from, L. 11. ff. de Oper. Nov. nunt. which bears, *Cuilibet enim intelligenti veluti fabro, Nuntiatum, infantem & furiosum tenet.* And L. 10. ff. Eod. Operis Novi Nuntiatio in rem fit, non in personam. And Voet upon the foresaid Title § 6. says, *Nec precise ei ipsi, qui Novum Opus fieri curat nuntiatio facienda est, verum etiam, absente Domino & Nuntiationis ignaro, Alteri cuivis fieri potest, qui nomine domini est in re presenti, sive servus sit, sive faber vel opifex, sive puer aut puella :* So that whoever had an Interest in the Mill, the foresaid Intimation was sufficient for them all : However the Interest of a third Party is *jus Tertii* to the Viscountess, and cannot be a Defence for her Contempt. To the second *Alledgeance*, That the Complainer had not instructed his Interest. Replied, *imo.* That this being a Complaint for contempt of Authority, the Complainer is not obliged here to debate, what Right he has to the Mill, it being sufficient for him to say, that the Building was continued *Spreto Mandato*, which is the only Point now under Consideration : For were it otherwise, the same might be said in Defence of a Charger in case of a Suspension, or of an inferior Judge in case of an Advocation intimate ; so that every Person who had ill Nature and Power enough, would be Judge of Suspensions and Advocations raised against themselves, and proceed, if they thought the Reasons not relevant. 2do. This is expressly contrary also to the Civil Law, For so it is in L. 20. § 1. ff. De nov. op: nunt. *Edicto expressum est, ne post novi Operis Nuntiationem quicquam operis fiat, antequam vel nuntiatio missa fiat, vel vice nuntiationis Missæ, satis datio de opere restituendo fuerit interposita, qui igitur facit & si jus faciendi habuit, tamen contra interdictum pretoris facere videtur, & Ideo hoc Destruere cogitur :* And Voet upon that Title § 7. Says, *nec Interest utrum jus nuntiandi ambiguum sit, an manifeste injusta Dicatur esse nuntiatio, eo quod is, cui nuntiatum est, debuisset jus suum apud pretorem docere, aut satisfacere, atque ita impetrare nuntiationis remissionem, non ipse sibi judicium de Causæ propriæ justitia vindicare : Unde licet jus faciendi habuerit, tamen quia contra interdictum fecit, pro eo habendum est, ac, si nullo jure fecisset.* And afterwards on the same Paragraph he says, That

it

it makes no Defence, albeit he who builds contrary to the Interdict of the Judge, has intented an Action of his Right, and has *liscontestate* the same; and he compares the proceeding in that Work to a Spulzie, and says, that *attentata ante Omnia reparanda, quemadmodum Spoliatus ante Omnia restituendus est*: And doubtless the Lords Suspension here, has the same Effect with the *Novi operis Nunciatio* among the Romans.

Astor Isla. Al-
ter Boswel. }

The Lords fined the Viscountess in 100 Lib. for Contempt of Authority, and the Pursuers Expences; and stoped the going of the Mill, till the first Day of March then next, but refused to demolish the Mill. And allowed both Parties to proceed to have the Point of Right determined in the meantime.

Mackenzie, Clerk.

DECISION XLIV.

Eodem Die.

Captain John Brodie,

AGAINST

Mr. Patrick Campbel of Munzie.

Captain Brodie having commenced a Process against Lieutenant Colonel Hay, of the Earl of Tullibarden's Regiment; during the the Dependency, arrests in Munzie (who had been Pay-master to the Regiment while it stood) his Hands, some Arrears due to Hay; and after Decreet obtained against the Lieutenant Colonel, having insisted in a Furthcoming against Munzie: The Question came to be Discusst, How far an Arrestment in the Hands of the Pay-master could affect Money belonging to the Officers?

It was Excepted for Munzie, That by the Roman Law, such an Arrestment was so far from being supported, That by Nov. 88. C. 1. The Ufer thereof was punishable. And that Pay cannot be arrested, appears further from L. 4. 6. *De execut. rei jud.* Where it's said, That even *ob rem judicatam stipendia retineri non possunt*, except in *subsidiu*; & *si aliis rationibus exequi nequeat*: And much less, where the Arrestment is only on a Dependance. Nay, according to L. 5. 6. *Qu. res pig. Oblig. poss.* *Athletarum præmia pignori dari non possunt*; much less then can *stipendia militum*, which only *in subsidium etiam ob rem judicatam capiuntur*. And this is also supported by our Acts of Sederunt in annis 1613, and 1626, whereby Pensions and Fees of the King's Publick Ministry and others, are declared not arrestable: Specially considering their Pay is to be looked upon as alimentary. 2do. By King William's Regulations 1695, Founded on an Act of Parliament, 6to. & 7mo. *Gulielmi*, Cap. 7. The Pay of the Army seems not arrestable, for there § 9. it is Statute, That all Agents, Clerks, &c. for or on the account of any Colonel or commanding Officer, &c. shall before they receive any Pay, give Bond to his Majesty, with two sufficient Securities: The Condition of which Bond is, to answer the Sums so by them to be received, &c. And § 10. It is Enacted, That

no Colonel, Officer or Agent, shall in Accompts by them stated, be allowed, any Sums of Money, upon Pretence that they had been by them advanced or lent to any Officer or Souldier thereafter: So that to imagine Agents liable to Arrestments, and at the same Time obliged to fulfil the Conditions of the Bonds given, is to suppose manifest Contradictions.

Replied for the Pursuer, That the Question is not here anent *Subsistence*, which is indeed necessary for the Publick Service: But anent *Arrears*, which is a Subject over and above what's necessary for subsisting in the Service, and is arrestable: Specially when the Fond is still due after the Regiment is broken, and the Lieutenant Colonel out of the Service: So that there is no Occasion of detaining it on account of the Necessity of the Service. Which Distinction is well established in parallel Instances by the Lord Stair's Institutions, *Lib. 3d. Tit. 1. § 37.* where he says, *That it's a Competent Exception against Arrestments, that the Thing arrested is a proper Aliment, and not exceeding the Measure of Aliments; and the Fee of a Servant was not found arrestable, in so far as it was necessary for the Service he was in; but only for the Superplus, more than was necessary for his Aliment in such a Service.* July 9. 1668, *Beg contra Davidson*, Preceptor of *Heriot's Hospital*. And as to the Act of Parliament and Regulations abovementioned, tho' they can have no Influence on this Decision, being *English Acts* before the Union; yet even they seem more to Favour the Pursuer; for there it is expressly appointed, That the Factors for Regiments shall issue furth their Payments to the Officers, conform to their respective Proportions, but no Prohibition of legal Diligence against Arrears.

Actor Boswel. }
Alter Se. }

The Lords found, The Sums in question were arrestable.

Mackenzie, Clerk.

DECISION XLV.

Eodem Die, Inter Eosdem.

ANother Point having fallen to be Determined, *viz.* Whether *Munzie* was Factor for the Colonel only, or both for him and the Officers?

As to this it was Excepted for the Defender, That he opposed his Factory, in the Terms whereof he is only liable, which is only from the Colonel, and to whom alone he is declared accountable; and by the foresaid Instructions by King *William*, the Factor is only to issue out the Money conform to his Majesty's Directions; so that where no such Directions were, it behoved to be by the Colonel, who had the only Power to receive, and was accountable to his Majesty for the Money of his Regiment. And tho' other Officers also contributed for the Agent's Pay, yet such an Office was absolutely necessary for Management of the Regiment's Affairs.

Replied for the Pursuer, That *Munzie's* Discharge from the Lieutenant-Colonel was opposed, which bears *in Terminis*, That he hath made full and complete Payment of what Arrears he had in his Hands, notwithstanding of Arrestments laid in his Hands by the Pursuers. *2do.*

Tho'

Tho' out of Respect to Colonels, they have the Nomination of the Factor, yet still by the Nature of the Trust he was Factor also for the Regiment, and liable to Compt to every Officer for his Pay, as well as to the Colonel for his. 3^{to}. The Defender owned this by clearing with the several Officers, without noticing the Colonel, or receiving his Warrant to pay any of them. 4^{to}. There is a Decision of the Case *in Terminis*, 20th February 1712, *James Napier* against *George Grant* Paymaster to *Grant's* Regiment; where the whole above Defences were proponed and repelled.

Actor Boswel. }
Alter Se. }

The Lords Found, That the Defender was Factor for the Behoof of the Officers the Time of the Arrestment, and therefore that their Money was then Arrestable in his Hands.

Mackenzie, Clerk.

DECISION XLVI.

[28th January 1715.]

The Creditors of *Hunter of Townhead*,

AGAINST

Mary Douglass his Relict.

IN the Process of Mails and Duties at the Instance of the Adjudgers of the deceast *Hunter of Townhead's* Lands, who had charged the Superior, but were not Infeft, nor the Legal expired, the Relict compearing, and producing her Service to a *Terce*, and craving Preference:

It was *Alledged* for her, 1^{mo}. That the Relict is in the Rule; for as a *Terce* is defined by the *Lord Stair*, *It is the Third of the Tenements in which the Husband died Infeft as of Fee*: In this Case the Husband died so, therefore she ought to have the *Terce*. 2^{do}. As 'tis Reasoned by the *Lord Stair* on the Point, If an Apprising without an Infeftment can exclude a Relict from her *Terce*, (which he says it should not, *L. 2. Tit. 6. § 17.*) even tho' there were a Charge against the Superior upon an Apprising, it would not exclude him from the Ward, Non-entry and Relief; so neither should it exclude a Relict from her *Terce*, unless she had a Conjunct Fee or Liferent: For the *Terce*, excluding the Superior from the Rule, *Qui vincet vincentem*, it should also exclude the Appri-fer. 3^{to}. Nothing excludes the Relict, but such a Right as a Relict would have a *Terce* of, and consequently nothing but a Right whereon Infeftment had followed, or an irredeemable Disposition: And tho' an expired Apprising might plead Preference, yet one not expired never can, being but a personal Right, which did neither dissolve the Defunct's Title, nor would hinder his Heir to serve; and therefore cannot exclude the Relict from her *Terce*.

Answered for the Creditors, That they are favoured by the Opinion of our greatest Lawiers, and by the Analogy of Law: For, 1^{mo}. The *Lord Dirlton*, upon the Word *Terce*, proposes a Question, thus: *A Person having Disposed Lands bona fide, but being prevented by Death before the Buyer was Infeft, Queritur, If the Relict will have Right to a Terce?*

And Argues thus, That the Heir being liable to Implement, the Relict should be in no better Case than he; and therefore has Right only to a Terce of Lands not disposed, and the Words in the above-cited Definition ought to be understood *Civiliter*. And in another Query, *Whether a Comprising after the Husband's Decease will militate against her?* He makes a Difference betwixt a Comprising whereupon the Superior is charged, and where there is no Charge: And in the present Case there is a Charge. And Sir Thomas Craig, L. 2. P. 312. § 2. says, *Sed hoc jure utimur, ut omnibus Hereditariis oneribus quæ Debita fundi dicimus, pro suo triente pro rata trientis teneatur: Nam triens transit cum oneribus realibus, quæ tempore Mortis Defuncti, rei inhærebant, non autem cum personalibus*. Now, an Adjudication is a real Burden, specially after a Charge. And the Lord Stair is of that Opinion, L. 3. Tit. 2. § 19. and says, That an Apprising led before the Husband's Death excludes the Wife's Terce, and cites a Decision mentioned by Hope: Nor is there any Difference here whether expired or not; because even during the Currency of the Legal, an Adjudication is a real Burden, till Payment. 2do. The Analogy of Law also favours the Creditors; for a Wife's Terce is not founded on any Right stated in her own Person, but arises to her from the Right that the Husband had at his Decease, and these real Burdens that then affect the Fee, and will debar the Heir, ought likewise to be a proportional Burden upon the Terce: For the Husband's Infestment was in Effect no Infestment in Prejudice of the Adjudication. And with us a Charge is equivalent to an Infestment. Lastly, The Relict's Terce and *Jus Relictæ*, are upon the same Footing *quoad* Creditors: and any personal Debt excludes the Relict, therefore so must a real Debt the Terce.

Ista for the Creditors. Alter Boswel.

The Lords Found the Adjudication, with the Charge against the Superior, excludes the Terce.

Mackenzie, Clerk.

DECISION XLVII.

[1st February 1715.]

Sir Archibald Sinclair and his Lady,

AGAINST

The Marquis of Annandale and Others.

THE Marquis of Annandale having Two expired Apprisings, and a Decreet of Preference and Mails and Duties against the Lady Stapleton and the Tenants; yet the Lady continuing in the Natural Possession till her Death, and having in her Lifetime disposed her Right of Fee to Dame Margaret Irvine her Niece, the Marquis his Chamberlain, after her Death, came, and so far took Possession in Name of the Marquis, that he set a new Tack to the Tenant: Notwithstanding whereof Irvine of Stank, Sir Archibald's Factor, came and took Possession of the House, whereupon he and others who had concurred, being conveyed in a Riot by the Chamberlain before the Stewart-Depute of Annandale, they

they procured an Advocation, upon which that Process sisted. But the said *Stank*, his Wife, and others, having stopped the said Tenant in his Labouring, the Chamberlain raises a new Process of Riot before the said Stewart, wherein after Probation led, and none of the Defenders compearing except *Stank's* Wife, she was Imprisoned, and the Chamberlain brought other Ploughs and Laboured the Ground; upon which Sir *Archibald Sinclair* and his Lady gave in a Complaint to the Lords, for Breach of Authority after an expedite Advocation. To which there were also *Answers* given in, That there was no Procedure in the particular Cause Advocate, which only concerned the Dwelling-house, and that as to other Matters Parties were not obliged to answer summarly: But the Pursuers thereafter, and when 3 Years were expired, raised a new Process of Intrusion, Violence and Oppression, &c. Where

It was *Answered* for the Defenders, *imo. Prescription*, the Action not being Intented within the Three Years.

Replied for the Pursuers, That the Prescription was Interrupted by the Complaint given in to the Lords, whereupon Answers was superseded.

Duplied for the Defenders, That a *summar Petition* is noways Equivalent to a Process of *Intrusion*, which necessarily must be Intented within 3 Years; for no Body was obliged to Answer the Complaint, which appears by the Pursuers raising a new Process, but without the Time.

Triplied for the Pursuers, That by the Complaints and Answers thereto, the Defenders were sisted *in judicio* as such; and the Lords ordaining the Petitions to be Seen and Answered, did abundantly supply the Want of a Summons, which is only designed for Certiorating Parties concerned: so that the whole Matter being by the Complaints brought under View, did sufficiently testify the Pursuers Intention to prosecute their Right, and was a more effectual Interruption than a Summons only Execute.

The Lords Found, That the Action of Intrusion Libelled is prescribed as to the violent Profits, not being intented within the 3 Years, notwithstanding of the Complaints exhibited and insisted in against the Defenders shortly after the Facts Libelled.

As for Sir Walter 2
Pringle. Alter Se. 5

Robertson, Clerk.

DECISION XLVIII.

Eodem Die.

Claud Johnston Merchant in Edinburgh,

AGAINST

James Murray Merchant in Leith.

William Bouden Merchant in London, being Creditor to James Murray, draws a Bill upon him payable to himself or Order; which is accepted by Murray; and Bouden remits the Bill to his Correspondent in Edinburgh Andrew Edgar, to receive the Contents. Instead

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of

of paying to *Edgar*, *Murray* draws another Bill on *George Johnston* Merchant in *London*, in these Terms, *At Ten Days Sight of this my Bill of Exchange, pay to Mr. William Bouden or Order, Fifty Seven Pounds Ten Shillings Sterling, and retire my Bill for the said Sum, which fell due in September last; place it to my Accompt, without further Advice.* This Bill is dated 10th *November* 1709; upon the 19th of the said Month the Bill is accepted by *Johnston*, and that Night *Bouden* acquaints his Correspondent *Edgar* of its being accepted, and orders his Delivery up of the former Bill to *Murray*: Which was accordingly done by *Edgar*, without any new Value, but only that *George Johnston* had accepted the second Bill. Fourteen Days after Acceptance *Bouden* protests *Johnston's* Bill for not Payment, and that Night advises *Murray* thereof, and tells him, That by the next Post he is to send the Bill and Protest to Mr. *Edgar*, in order to get Payment: And accordingly, by the Post following, writes to *Murray* that he had sent them, and desires him to pay in the Contents to *Edgar*. Thereafter *Bouden* breaks, and *Claud Johnston*, to whom the Bill was indorsed, pursues *Murray* for Payment.

Answered for the Defender, 1mo. That the Bill was not duly Negotiate; for being payable 10 Days after Sight, it ought to have been Protested immediately after falling due, whereas it was not Protested till the 4th Day thereafter. 2do. Tho' it had been duly protested, yet *Bouden* could have no Recourse; because supposing he had been duly advised of the Protest, yet the protested Bill was not proffered timeously to him, which ought to have been done, that he might thereon have operate his Relief against *Johnston*. 3tio. *Esto* That all these necessary Forms had been used, yet that he could not be liable in Recourse, because *Bouden* had acquiesced in the Bill, so soon as accepted by *Johnston*, in solutum: And in Consequence thereof had ordered the Delivery up of the First Bill, whereby he had for ever debarred himself from any Recourse against the Defender; and the Defender, in Belief that he was no more liable, had given Credit to *Johnston* for that Sum, and the first Bill being in the Defender's Hands discharged, was all one as if he had got a Discharge of both.

Replied for the Pursuer to the First, That the Bill was protested in the precise Form prescribed by *Cap. 17. 9. William III.* which regulates the Manner of Diligence on Bills; and whereby no Protest can be till after 3 Days from the Time of the Bill's falling due; which was duly observed here, it being due the 29th of *November*, and protested 3d *December*. To the Second, That no Law requires the Creditor to offer to the Drawer the protested Bill, it being sufficient to give timeous Advice: Which being done in this Case, it was *Murray's* Part to call for the Bill and pay it, since he was already Certiorate; and if he needed the Protested Bill, he ought to have first paid *Bouden* or his Correspondent, and then taken it up: But *Bouden* was not bound to seek after him with the Bill. To the Third, That certainly the Defender was liable to *Bouden*, not only to procure the Bill accepted, but paid; for all the Transaction was, That *Bouden* in place of a Bill, whereof he was to receive Payment at *Edinburgh* from *Murray*, got a Bill of like Value payable at *London*, which certainly the Drawer was as much obliged to see implemented at *London*,

as if Money had been actually paid for the second Bill, because on Account of the Second he got up the First.

Astor Boswel. 2
Alter Graham. 3

The Lords Found, That the Retiring or Delivery up to Murray of his own accepted Bill, did not afford him any Defence against Bouden or his Assigney, as to the Recourse upon him as Drawer of the Bill on George Johnston; and that notwithstanding that the said Johnston had Debit him therewith in his Accompts, and found the Bill accepted by the said Johnston duly Negotiat by Bouden.

Robertson, Clerk.

DECISION XLIX.

Eodem Die.

Mr. Thomas Hope of Rankeillor Advocate,

AGAINST

James Culbertson and Patrick Goodale Baxters.

THere being a Contract in 1712, betwixt Rankeillor and these Baxters, whereby he sells them 70 Bolls of Wheat, to be delivered Yearly for 5 Years, on the 1st. of July at Leith, they being at the Expence of Freight, Shoar-Dues, &c. and they paying Merchinstons Price, with Abatement of 1 shil. per Boll, containing Penalties, &c. The first Two Cropts went over without any Debate; the Baxters themselves having gone over, even after the first of July, and Hired their own Boat, and came along with the Victual. But Rankeillor expecting they would do the like the Third Year, waited their Conveniency; but finding they delayed, he Instrumented them upon the 24th of July to receive the Victual, and it having Arrived upon the 29th, he again Instrumented them to receive it at the Shoar; and they absenting themselves, the same was by Order of the Baillie of Leith, put up in a Loft. And this Case coming to be Debated in a Suspension;

It was *Alledged* for the Suspenders, That they could not be Liable to receive the Victual, because the Charger had not observed his Part of the Contract to them, by delivering the Victual at Leith upon the 1st of July, as was Stipulate.

Answered for the Charger, That, that was owing to the Suspenders themselves, who had taken a Method different from the precise Rule in the Contract for their own Conveniency. 1mo. In not requiring it precisely at the Time, but both the Years receiving it several Days after. 2do. In not allowing the Charger to Freight, but going over themselves: Therefore, tho' *Dies interpellat*, yet their former Practise having both altered the Day and Method of Transportation, this certainly Excuses the not precise Performance, unless they had given some Intimation, that whatever they had done formerly, the Chrger this Year was to perform *in terminis specificis*. 3tio. They could not subsume that they

Q 2

sustained

sustained any loss by this small Delay ; so that it's always a good Answer in such Cases, *Nil tibi deest.*

Actor Sir Walter
Pringle & Se. Alter
Horn.

The Lords Repelled the Reason of Suspension, and found the Letters orderly proceeded for the principal Sum, as Liquidate by Merchiston's Declaration; but suspended for the Penalty.

Mackenzie, Clerk.

DECISION L.

Eodem Die.

Graham of Benchils,

AGAINST

Blair of Inchyra.

Benchils being Habite and Repute a weak Person, tho' not altogether Fatuous, grants a Disposition of his Lands, which were worth about 800 Merks Yearly, &c. in Anno 1706, in Favours of Inchyra his Brother-in law ; which Disposition proceeds upon a Narrative of Money received : Which, with 2000 Merks, to be paid, not to the Granter, but to Sir James Ramsay of Bamff, and 6000 Merks payable to his own and his Wife's Friends, for which Inchyra gave Bonds, but containing Irritances, in Case the Disposition did not subsist, and with Reservation of the Granter and his Wife's Liferent, is declared to be the adequate Price of the Lands, containing also absolute Warrandice. Thereafter in January 1707, and after the Decease of Benchils's Lady, there is a Contract entered into betwixt them, wherein Benchils Dispones to Inchyra all his Debts, Sums, &c. that did then, or should thereafter belong to him, with the Rents of his Lands, and Inchyra binds to Aliment him, and Cloath him, but only out of his Lady's Thrift, &c. and to relieve him of his Debts, not exceeding 2000 Merks, and to pay him 200 Merks Yearly ; and in February thereafter, Benchils renounces in Inchyra's Favours, his Liferent formerly reserved.

The Lords before Answer having allowed a Conjunct Probation of the Facts and Qualifications alledged for either Party ; and many Witnesses being thereupon Examined,

Actor Graham
Alter Lord Advocate.

The Lords reduced the Disposition, made by the Pursuer to the Defender in December 1706, with the Contract betwixt them in January 1707, and the Assignment, Disposition and Renunciation of the Pursuer's Liferent to the Defender in February thereafter, and Decerned the same to be Void and Null.

But upon a Reclaiming Bill and Answers, the Matter was delayed till June.

Mackenzie, Clerk.

D E.

DECISION LI.

[2d February 1715.]

Ogilvie of Murthill,

AGAINST

Lesly of Glaswell.

THE deceast Lesly of Glaswell, having granted Two Bonds to the also deceast Ogilvie of Murthill, of the same Date; there was a Disposition granted by Murthill to Glaswell of some Lands, with Warrantice from Fact and Deed, and particularly against an Infeftment in Favours of one Janet Millar, proceeding upon a Bond granted by a former Heritor. Upon a Charge to make Payment, Glaswell Suspends, and withal raises a Process of Contravention of the Warrantice, upon his being excluded from the Mails and Duties, by a Liferent Infeftment in Favours of one Jean Webster, granted by the former Heritor to his own Son, and this Jean Webster in Conjunct Fee and Liferent.

Alledged for the Charger, That the Infeftment to be Warranted from, was an Infeftment proceeding upon a Bond to Janet Millar, her Husband, and her Heirs; whereas the Infeftment founded on by the Suspender, was a Liferent Infeftment in Favours of Jean Webster, proceeding upon a Contract of Marriage; and therefore since the Description of the Incumberance, of which the Lands were to be purged, did not agree with the Nature of the Sasine founded on, it was in Vain to pretend that the Charger ought to Purge.

Answered for the Suspender, That it was plain, 1mo. That an Infeftment was Warranted against, which the Disposer was expressly obliged to Purge. 2do. It did not appear, that ever there was such an Infeftment as that mentioned in the Clause of Warrantice, in the Person of one Janet Millar; It follows then, that the Infeftment founded on and produced by the Suspender in Favours of Jean Webster, granted by the then Heritor of the Lands, must be taken for that which was understood by the Parties in the Clause of Warrantice; *ut plus valeat quod actum est, quam quod simulate Concipitur*; since *falsa Designatio*, or even *Error in persona non nocet*, both which we are informed of in L. 17. § 1. de Cond. & Dem.

The Lords Found, That the Warrantice in the Disposition by the Charger's Father to the Defenders, was only against an Infeftment in Favours of Janet Millar, proceeding upon a Bond granted by the Heritor of the Lands; and the Incumberance not Purged, founded upon by the Suspender, was an Infeftment in Favours of Jean Webster, proceeding upon a Contract of Marriage betwixt the Heritor's Son and her: Therefore found the Contravention of the Warrantice not incurred.

Sir James Justice Clerk.

R

D E.

Ador Graham, }
Alter M'doual. }

D E C I S I O N LII.

[3d February 1715.]

Catharine Stevenson, and Mr. James Gillon Advocate her Husband,

A G A I N S T

The Children of the deceased Baillie Fife.

*A*lexander Stevenson Merchant in Edinburgh takes Bond from Young of Winterfield, payable to himself and his Wife in Liferent, and to their Daughter *Susanna Stevenson* in Fee; and failing the said *Susanna* by Decease, to the said *Alexander* his Heirs, Executors or Assignies. *Susanna* having survived her Father, Baillie Fife, who had married one of her Father's Sisters, does, as Tutor to the Daughter, oblige *Winterfield* to give a Corroborative Security out of his Lands for the Sum; wherein the Form of the Original Bond is altered, being indeed to *Susanna* and the Heirs of her Body, but failing them to his own Wife and her two Sisters, and the Portion of the Deceasing to accresce to the Survivors: So that *Margaret* having been the only surviving Sister after the Niece's Decease, and by this Means claiming Right to the whole, disposed the same to the Baillie's Trustee, which is his Children's Title in the Competition.

On the other Hand, if the Bond should be found Heritable by Destination, *Susanna* dying without Issue of her Body, both her and her Father's next Heir was one *Alexander Stevenson*, younger Son to *Robert Stevenson* of Chesters her Father's eldest Brother: And Mrs. Gillon the said young *Alexander's* Sister, having Adjudged from him the foresaid Subject, this became her Title to Compete. The Question seeming to run upon this, Whether the Bond was Heritable or Moveable by the first Destination?

It was Alledged for *Catharine Stevenson*, That the Bond was Heritable, because it contained a gradual Substitution of Heirs, viz. To the Father and Mother in Liferent, to *Susanna*, and failing her by Decease, to the Father's Heirs, Executors, or Assignies. That it was repugnant such a Sum should be Moveable and carried by Confirmation, seeing failing *Susanna*, there was necessarily required a Cognition, both of her Failure and the Heirs of her Body, and who was next called: And by our Form these Points were only cognoscible by an Inquest; as *Dirlton* states a like Question upon the Word *Taillies*, and resolves the Bond Heritable. Conform whereto it was lately decided betwixt *Walker* and *Simpson*, in February 1714; where, in a Contract of Marriage, a Sum being provided to the future Spouses, and longest Liver of them in Liferent, and to the Heirs to be procreate betwixt them in Fee, which failing, to the Wife her nearest Heirs and Assignies whatsoever; the Sum was found Heritable, and to belong to the Wife's Heirs, and not to her Executors.

Answered for the *Fifes*, That in Bonds where there is no Clause of Infestment, nor Executors expressly secluded, the Sums never belong to the Heir, but to Executors: And thus the Right of this Bond came to *Alexander's* Executors Designative, who are Heirs substitute to *Susanna* the

the Fiar. And tho' the Subject which was Moveable by the Original Bond, became Heritable by the supervening Right of Wadset, yet that nowise altered the Succession, as provided by the Original Bond, but only made an Additional Security heritable *quoad* the Debitor; which is not extraordinary, as is clear in Infeftments of Annualrent.

As to the Decision founded on, *Answered*, That the same did not meet this Case; for there the Question was about a Succession in a Contract of Marriage, here the Subject is a Bond of borrowed Money; there, there was a Series of Substitutions one failing another; here is only one Substitution, *viz.* *Alexander Stevenson's* Executors, as Heirs substitute to *Susanna* the Fiar; there, there was no Mention of Executors in the Clause of Substitution, but only of Heirs; but here Executors are expressly contained in the Clause of Substitution. And *Lastly*, In the said Decision the Subject required a Service before it could be transmitted, which made it Heritable, there being no Mention of Executors; but here, that Defect is supplied by the heritable corroborative Security, wherein the Three Sisters are expressly substitute, and accordingly contained in the Infeftment.

Sir Wal. Pringle }
for Stevenson. Alt.
Ro. Dundas.

The Lords, in Regard there was but one Substitution in the Original Bond to Susanna Stevenson Fiar of the Sums therein, viz. to the said Alexander Stevenson his Heirs, Executors, or Assignies, Found, upon the Death of Susanna, the Succession by the Original Bond would have devolved upon the Executors of Alexander Stevenson. Vide 19. February.

Sir James Justice, Clerk.

DECISION LIII.

Eodem Die.

Thomas Henderson Writer in *Edinburgh*,

AGAINST

The Magistrates of Jedburgh.

A Merchant in *Jedburgh* being apprehended there, at the Instance of *James Hamilton* Merchant in *Dumbar*, for 58 *Lib. Scots*, in Anno 1679, and *Robert Ainsly* then Baillie being charged to Incarcerate him, did it accordingly, but thereafter set him at Liberty: Upon which a subsidiary Action being insisted in against *Ainsly* and the then Magistrates, there was a Decreet obtained before the Lords in 1680, decerning also for 80 *Lib.* of Expences and Damages; which Decreet is by Progress now in the Person of *Thomas Henderson* Writer in *Edinburgh*, who now insists in a Process against the present Magistrates, for Payment of the Sums decerned for in that Decreet. In which Action,

It was for the Defenders *Alledged*, That the present Magistrates were not cited, tho' the former were; and since the Action was not insisted in during their Office, the Citation was of no Effect; *First*, As to them, because now they have no Concern in the Town, being *Functi*: Nor are the

the present Magistrates obliged to answer, as not being called. And since they are the only Administrators and proper Defenders of the Town's Commonty, being in Office, they ought to be cited before any Process can be insisted in against the Town.

Answered for the Pursuer, That the Magistrates, who were in Office when the Summons was raised, being duly cited, they who pursue Corporations are not bound to renew their Citations upon every Change of the Magistrates or Governours: For the Citation is against the Community, and only against the Magistrates for the Time, as representing such Communities.

Astor M. Lumisden. }
Alter W. Scot.

*The Lords Reponed the Magistrates to their Defences,
and turned the Decreet to a Libel.*

Sir James Justice, Clerk.

DECISION LIV.

[4th February 1715.]

Mrs. Catharine Borthwick,

AGAINST

Crawfurd of Crawfurdland, and Boid of Pitcon.

C*rawfurdland* and *Pitcon* being, in *Anno* 1699, bound as Cautioners for *Ker of Kerland* in Two Bonds, granted to Colonel *Borthwick*, payable at the first Term after Decease of the Colonel's Lady, and assigned by him to Mrs. *Catharine* his Sister; upon her Charging and their Suspending, this Defence was proponed, That by the Act 1695, Cautioners are liberate in 7 Years after the Date of the Bond; which Space is now elapsed.

To which it being *Answered* for the Charger, That the Bonds being only payable at the Term foresaid, and the Colonel's Lady having only died within these 2 Years, the 7 Years could not begin to run till after her Decease.

Replied for the Suspenders, That they opposed the Act of Parliament, bearing, That Cautioners should not be bound for longer than 7 Years after Date; so that this was a special Act communicating a Priviledge to Cautioners, not to be regulate by the common Rule of Prescription, the 7 Years being precisely to be counted from the Date of the Obligation, as the Act bears. 2^{do}. Tho' the Money could not be exacted within the 7 Years, yet other Diligences, such as Inhibition, Arrestment, Adjudication, &c. might been used.

Duplied for the Charger, 1^{mo}. That either the Law is to be restrained to Cases concerning Cautioners, in which the Term of Payment and Exigibility is within 7 Years; in which Case the present Cautioners cannot have the Benefit of the Act: Or if it be extended to all Cautioners, even where the Term of Payment is beyond the 7 Years, then *in sano sensu* the 7 Years can only run from the Term of Payment; otherwise it were almost impossible to bind a Cautioner in any Conditional Bond, where the Condi-

Condition might happen not to be, or could not be purified within the 7 Years; nor could Cautioners be bound where the Term of Payment is expressly stipulate beyond the 7 Years, which could never be the Meaning of the Act. 2do. As to using Diligences, this is to be understood of Cases wherein these could be used *cum effectu*, and not bare inchoate Diligences, but such as may be compleated.

After Sir Wal.
Pringle. Alter }
Hutchison.

The Lords Found the Act of Parliament 1695 statutes only in the Case where Sums fall due, for which Diligence could be used within 7 Years; and that in this Case no Sums did fall due within 7 Years of the Date of the Bonds charged on: And therefore Repelled the Defence founded on the said Act of Parliament.

Alexander, Clerk.

DECISION LV.

Eodem Die.

Isabel Brown Spouse to Robert Pyle Writer in Kelfo,
A G A I N S T
Her Husband.

Lancelot Brown Feuar in Kelfo, having contracted Isabel his Daughter in Marriage with Robert Pyle, amongst other Things 'tis provided in the Contract, That in case he had no Heirs-male of his present, or any other Marriage, then Isabel was to be Heir-portioner, and Bairn of the House with the other Daughter or Daughters. Lancelot having married a second Wife, repeats the same, or very like Clause in his own Contract of Marriage: But there being no Children of the Marriage, makes a Taillie of some Lands and Houses in Favours of Isabel for her Liferent Use allenary, and to the Heirs of her Body; which failing, to others therein-substitute. In which Disposition, the Husband Robert Pyle his *Jus Mariti* is expressly excluded, even as to the Wife's Liferent, which her Father there declares, *shall be possess by herself allenary, and the Rents applied to her own Use.* After the Father's Decease, the Wife raised Declarator against her Husband, for declaring the foresaid Exclusion of his *Jus Mariti*, and that she had the absolute Power of up-lifting the Rents, &c.

Answered for the Defender, That the Father could not make a legal Conveyance in these Terms, in regard of the Provision abovementioned, in the Defender's Contract with the Daughter, by which there was *jus qualitum* to the Husband in Case of that Succession, in so far as the *jus Mariti* might extend to: *Et quod meum est sine facto meo a me avelli nequit.* 2do. The same Clause is renewed in his own second Contract, which carries not only a new Provision in Isabel's Favours, but supposes and Implies, that she was settled in the Right as Heir, by an Anterior Provision.

Replied for the Pursuer, 1mo. In General, That there is a great Difference betwixt a Husband's renouncing his *jus Mariti*, and a Third Party's dispo-

disposing to a Wife with that express Quality, since a Third Party may impose what Conditions and Qualities he pleases upon his own Grant; with which the Husband must take it, or otherways want the Right. 2do. The above Clause gave no such *just Quæsitum* to the Husband: For, 1mo. The Husband having got a good Portion, the above Provision is not such a precise Tie, as the Father might not rationally Dispose otherways; but only he could not make plainly Fraudulent Deeds to Overturn this Settlement, which was only Provisional, as in the Case of a Clause of Conquest, since still *Isabel* as Heir Portioner, behooved to Represent her Father, and fulfill his Deeds not Fraudulent. 2do. This Clause was not Adjected in Favours of the Husband's *jus Mariti*, which was not in View, but the Clause was Personal to the Wife, so that there is no *jus quæsitum* thereby to the Husband, since the Clause being designed only to bring in *Isobel* equally with any other Female Heirs, the Husband's Marrying one of them is *Per accidens* only. 3tio. The Father having provided the Liferent to *Isabel*, and the Fee to the Heirs of her Body, he had effectually fulfilled that Clause, according to the true intent of it, tho' the Husband's *jus Mariti* be excluded, there being nothing in that Provision Demonstrative, that it was given upon Account of the Husband's *jus Mariti*, but only out of respect to *Isabel's* Mother and her Issue. 4to. The Clause it self was Conditional, if the Father should have other Daughters Alive at his Decease, but that Condition did not exist, nor does the repeating of the Clause in the second Contract of Marriage make it of more Force, but only shews the Father was remaining in the same Purpose and Destination in Favours of *Isabel*, as in the first.

Affor Sir Walter
Pringle, Alter Ro-
bert Dundas. }

The Lords Fand, That notwithstanding of the 1st and 2d Contracts of Marriage, the Father might Qualify the Right to his Daughter, to the Exclusion of the Jus Mariti.

Mackenzie, Clerk.

DECISION LVI.

Eodem Die.

James Hope in Peebles.

AGAINST

Fowlis of Ratha.

Fowlis of Ratha having become Cautioner in a Suspension, at the Instance of *Dalmahoy* and *Maleney*, against the said *James Hope*, and the Suspension not being Discusst in 7 Years; afterwards a Decreet being obtained against the Principals, and a Charge given to the Cautioners. In a Suspension of that Charge, the Question being, *Whether Cautioners in Suspensions, fall under the Act 1695?*

It was Alledged for the Charger, That *Ratha's* Bond did not fall under this Act, because the Law relates only to such as were Bound and Engaged for and with another Conjunctly and Severally, in any Bond or Contract

tract for Sums of Money, but Cautioners in Suspensions are not in that Manner Bound ; Besides, that such Cautionry would otherways be E-lusory, and most of such Cautioners would escape, which the Creditor could not prevent, seeing Discusing of Suspensions requires a Course of Time, frequently exceeding 7 Years, nor can the Creditor use any kind of Diligence against such a Cautioner, till he first obtain Decreet against the Principal Debitor. *2do.* *Esto* they fell under the Act, yet the *Septennium*, could only be reckoned from the Date of the Decreet, seeing before that Time no Diligence could be used against the Cautioner.

Answered for the Suspender, That he was founded on the very Letter of the Law, Narrating, *That Men were easily induced to become Cautioners for others*, which Alledgeance holds with greater Reason in Cautioners in Suspensions than others, because they are the more easily engaged, where they have some hope of Liberation by the Event of a Process. And the Law in the Statutory Part, does not Distinguish, whether they be bound for another *Judicially* or *Extrajudicially*.

Replied for the Charger, That in all Laws, specially such as are Correctory, the Narrative, which is the Legislators Motive, is much larger than the Statutory Part. And it's Ridiculous to pretend Prescription here, from the date of the Principal Bond, or the Bond of Cautionry, when the Cautioner is neither Bound Conjunctly nor Severally for the Principal Sum ; Nor hath a Clause of Relief in the Principal Bond, nor a separate Bond of Relief a Part intimate to the Creditor (all which are required in the Act) since this were indeed no less than to explain the Act, contrary to the express Tenor thereof.

*Attor Sir James Na-
myth, Alter Sir Walter
Pringle.*

*The Lords Fand, That Cautioners in Suspensions,
fall not under the Act of Parliament 1695.*

Mackenzie, Clerk.

DECISION LVII.

Eodem Die.

Thomas Main Merchant in Linlithgow,

AGAINST

James Maxwell Merchant in Glasgow.

IN this Case marked above, *January 18th 1715*, Main the Arrester having given in a Reclaiming Petition, Representing, that the *Action qua in fraudem Creditorum*, is not *in rem* but *in personam*, and therefore not Competent against a Third Party, who is not *particeps fraudis*, with several other Things before Proponed and Repelled. To which Answers were given in, *viz.* That what Exceptions are Competent against the Author, are likewise against the Assigney or Successor, and the Fraud is only Personal, as to it's penal Effects, when one Purchasses Moveables ; yet that it's otherways, where there is no Purchaser but a prior Creditor, who did not lend his Money upon the Prospect

these Goods, being in his Debtor's Possession, only Arrests for his Debt; for he cannot be in a better Case than his Debtor, since the Favour of Commerce does not come in here to make an Exception from the common Rule.

Graham for Main, }
Alt. Sir Walt. Pringle. }

The Lords adhered to their former Interlocutor of the 18th of January 1715, and fand the Fraud not only Relevant against Simpson the Common Debtor, but also against Main his Creditor Arresting, whom they fand not to be in the Case of a Third Party, Purchasing on Payment of a Price.

Robertson, Clerk.

DECISION LVIII.

[8th February 1715.]

Margaret Ker and Mr. Thomas Linnen her Husband,

AGAINST

Anna Ker and John Ker of Kerland her Husband.

THe Lands of *Kerland* being by the Infeftments thereof Vested in the Person of *Robert Ker*, and his Heirs Male, he in *November 1666* by a Holograph Write, not very formal, nor in good Stile, but sufficient to set furth the Mind of the Granter; made a Settlement of his Affairs, and Names whom he resolves should Succeed as Heirs, viz *Robert Ker his Eldest Son, and failzieing of him, Daniel Ker, and failzieing of him, Jean, Margaret, Anna, or Elizabeth Kers his Daughters*. Then Names a Provision of *1000 Lib. Sterl.* to be devited amongst his Younger Children; and Subjoins a Clause, *That in Case his Male Children Die, and none of the Female Children Succeed to him as Heirs, that then the said Female Children shall have among them 40000 Lib. Scots*; And then follows, *(and which foresaid Provision, which is forementioned in the Case, if my Heirs Male Live and succeed as Heirs, or do any way enjoy my said Estate, that the same is in Contentation of all Sums of Money, Portion Natural falling to, (or that befalls them by Contract of Marriage or any otherway) Robert the eldest Son Dies, and Daniel the Second succeeded and was infeft as Heir to his Father, and he granted a Disposition in Favours of Jean the eldest Sister (at least made a Conveyance to a Third Party for her behoof) and Jean Disposed the Lands to Anna the Third Sister, now Lady Kerland and her Husband, passing by Margaret the Second; who having formerly got Payment of her Share of the 1000 Lib. Sterl. does now insist for her Third Share of 40000 Lib. Scots Provided to the Daughters, in the Event of both the Sons Dying, and his Daughters not Succeeding as Heirs.*

Answered for the Defenders, That this 40000 Lib. never became a Debt, being only payable to the Daughters, in case of the Decease of the Granter's

Granters Two Sons, and their not Living to enjoy his Estate, which was a Case that did not Exist, *Daniel* having Succeeded, and being Infeft as Heir to his Father, and granting a Disposition to his Eldest Sister.

Replied for the Pursuers, That the Condition on which the Sum is payable, being *(in Case none of his Female Children Succeeded to him Heirs)* and none of them having so Succeeded, nay it being impossible for the Defender so to Succeed, either by Destination, because Younger, or by Blood, because then she could only come in as Heir Portioner with the Pursuer : Therefore the Pursuer being by a simulate Conveyance excluded from the Succession Destinate to her by her Father, she had good Right to Claim the Benefit of the Obligement.

Actor Boswel,
Alter Sir Jo.
Ferguson, & Ro:
Dundas.

*The Lords sustained the Defence in thir Terms, viz.
That Daniel Ker Succeeded to his Father, either by
Service or Precept of Clare Constat, and that Jean
Ker Succeeded to the said Daniel, either as Heir, or
by singular Titles.*

Alexander, Clerk.

DECISION LIX.

Eodem Die.

The Dutcheffs of Buccleugh,

AGAINST

John Davidson and others.

THE Dutcheffs of *Buccleugh* having raised a Process of Removing against *Davidsen* and others out of some of her Lands: It was alledged for the Defenders, that they were not duly warned; because, 1mo. The Warning was only on the Fifth of *April*, which is not Fourty free Days before *Whitsunday*. 2do. That the Warning was execute at the Kirk-door, before it was execute against the Defenders. 3tio. That the Execution did not bear on what Day the Copies were left on the Ground.

Answered for the Pursuer, 1mo. That there were Fourty free Days betwixt the Execution and the Term, compting the Day of Execution. 2do. That the Warning was execute personally at the Kirk-door, and on the Ground, which are all the Solemnities required by Law; and no matter whether the Execution was first at the Kirk-door, or to the Party. 3tio. That the Execution bearing the Copie, to be left on the Ground, and that the Tenents were warned the Fifth of *April*, That Date respects both the Warning the Tenents personally and on the Ground.

Actor
Alter Boswel.

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*The Lords repelled the Defences, and decerned
in the Removing.*

Sir James Justice, Clerk.

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DE

DECISION LX.

Eodem Die.

The Children of Baillie *Smith*,
 AGAINST
 The Earl of *Winton*.

IN this Action as mentioned *First* and *Third*, December 1714, The Lords having by their Interlocutor of the Eighteenth January 1715, Found, That the short Prescription could take no Place, with respect to the Salary of the two Years not accounted for; did now also Repel the Prescription, as to what Salaries were due preceeding the late Earl's Decease. And Found that these Salaries may be allowed by way of Discharge in the Accompts to be made preceeding the said Decease.

There being also Three Periods of Time condescended on, wherein Baillie *Smith* did manage, viz. 1^{mo}. From the Decease of the late Earl of *Winton*, in anno 1704, till the Death of his Second Son Mr. *Christopher*, (under whom the Baillie did manage) in anno 1705, being about Ten Months. 2^{do}. From the Decease of Mr. *Christopher*, till Baillie *Smith* obtained a Factory from the Lords of Session in anno. 1706. 3^{tio}. From the Time of the present Earl's Arrival in November 1707, till the Baillies Death in July 1710.

As to the First of these Periods, It having been proven that the Baillie assisted Mr. *Christopher* in the Managment of the Estate for the Space foresaid: The Lords allowed him for his said Assistance and Service, and for his Pains, and Expences 200 Merks per annum. But as to the Second and Third Periods, they found no Salarie due to the Baillie, and therefore assoilzied the Earl from that Part of the Libel.

Aetor *Falconer* }
 Alter *Horn*.

Gibson, Clerk.

DECISION LXI.

[9th February 1715.]

Thomas Rutherford of *Knowsouth*,
 AGAINST

Mr. *William Scot* one of the Regents of the College of *Edinburgh*.

A Bond of Corroboration being granted by Mr. *William Scot* to *Knowsouth's* Author, and he the Assigney now after Seven Years insisting for Payment; The Point to be discussed was, Whether the Act of Parliament 1695, anent the Prescription of Cautionries, can be extended to the Granter of the Bond of Corroboration?

Alledged for the Defender, That he was to be accounted a Cautioner, his Obligation being but Accessory; and Releif being competent to him by Law against the principal Debitor.

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Answered for the Pursuer, That the said Law being Correctory, is not to be stretched by Consequences. For the Act does only liberat such as, 1^{mo}. Did engage for, and with others *qua* Cautioners; Or, 2^{do}. Such in whose Favours there was a Clause of Releit insert in the Bond; Or, 3^{io} To whom there was a Bond of Releit a Part intimate to the Creditor: Now the Defender here is in a distinct Case from any of these Three. And the Lords 21st. *January* 1708, *Ballantine contra Muir*, did find, That it did not extend to Bonds bearing Clauses of mutual Releit, but only to Bonds where one of more *correi* is bound to releive the rest. And 16th *February* 1710, *Moire contra Foveran*, They found, That an Obligatory Missive, whereby the Writer obliged himself to procure Security to the Creditor of a former Bond: Or to pay the Debt betwixt and a precise Term, did not fall within the Verge of the said Act.

Replied for the Defender, That the Bond of Corroboration being an accessory Security, and no Innovation of the Debt, doth intitle the Granter to the Privilege of the Act as Cautioner: And that the first Decision was nowise parallel to the present Case. Because, a Clause of mutual Releit is only an Explication of what the Law provides, where several Persons are bound as full Debtors for one and the same Debt. And that the *Second* Decision did as little quadrat; Because, the Granter of the Missive had bound himself *ad factum prestandum*, which was not of the Nature of a Cautionry for a Debt.

Astor Hay. Alter }
Sir Ja. Steuart. }

The Lords Found, That the Granter of the Bond of Corroboration, is not in the Terms of the Act of Parliament 1695.

Alexander, Clerk.

DECISION LXII.

Eodem Die.

Gordon of Badinscoth,
AGAINST
Gordon of Inverebry.

MY Lady *Kinnaird* by Contract of Marriage with the late Earl of *Aboine* her first Husband, is provided to a Liferent of 5000 Merks, which the Lord *Kinnaird* her present Husband, with her Consent, did assigne in Favours of Mr. *William Black* his Heirs and Donators; and by a mutual Obligement betwixt my Lord and him, the Onerous Cause thereof is declared to be for the Intertainment and Alimment of my Lady: Which Assignment was thereafter revoked by his Lordship, as a *Donatio inter virum & uxorem*. Thereafter Mr. *Black* transferred the foresaid Right in Favours of *Badenscoth* elder, his Heirs and Assignes: And now the Son who is both Heir and Executor to his Father, with Concourse of my Lady, having charged Gordon of *Inverebry* as Factor to the Estate of *Aboine*, and as personally decerned against *in foro*, as *intus habens*, in a former Process at the Instance of Mr. *Black*, for Payment of bygone Annuities, and in time coming during his Intromission; *Inverebry* Suspends, and the Question arising, Whether the Charger

having my Ladys Concourse, hath sufficient Title to exoner the Suspend, notwithstanding of my Lord's Revocation?

It was *Objected* by the Defender against the Charger's Title. 1^{mo}. That the Right to Mr. *Black* being only a Trust, it was personal and could not be assigned. 2^{do}. That as such it could not be in *bonis De. functi*, the Trust having died with Old *Badinscoth*, and therefore the Charger could not make up a Title thereto, either as Heir or Executor to his Father. 3^{tio}. That the Charger is a *Papist*, and therefore by the 3d *Act*, 9 *Sess.* King *William's* Parliament, he is incapable to succeed to any Body, or be Factor or Chamberlain. 4^{to}. My Lord *Kinnaird* having revoked the very Assignment in Favours of Mr. *Black* for my Lady's Behoof, as being *Donatio inter Virum & Uxorem*, it cannot now subsist, even tho' my Lady concur.

Answered for the Charger to the *First*, That the Right, tho' granted in Trust, is not only in Favours of Mr. *Black*, but likewise of his Heirs and Donators; and Mr. *Black's* Translation to Old *Badinscoth*, runs in the same Strain; which also Answers the 2d Objection. To the *Third* Answered, That the original Trust was not conceived in Favours of the present Charger, but first of Mr. *Black*, and then of the late *Badinscoth*, who were not *Papists*: So that only *per accidens* the Trust was devolved upon the Charger. And therefore, notwithstanding the Act of Parliament, the Lady might very well oblige the Charger either to Renounce to be Heir to his Father, or Enter, and thereby establish proper Titles in his Person, in order to Denude himself, or obtain Payment for her Behoof; specially seeing the next *Protestant* Heir was not appearing for his Interest. To the *Fourth* Answered, That the Lord *Kinnaird* being to go Abroad, it was a Duty incumbent on him by the Law of Nature, and as a *Christian*, to settle upon his Lady a competent Provision for her Aliment: And therefore this Settlement was not a gratuitous, but most onerous Deed, specially since it was but Moderate, and not out of my Lord *Kinnaird's* Estate. For that a Husband can constitute an Aliment to his Wife, is plain from the Opinion of our Lawiers, particularly the Lord *Stair*, who *Page* 28th says, That Alimentary Provisions are so personal to the Wife, that *inherent ossibus*, and recur not to the Husband or his Creditors, tho' constitute by the Husband. Thus also the Lord *Dirleton* in his *Doubts*, speaking of an Aliment once Constitute, says, *Mirum igitur Advocatos primi ordinis tanto conatu & boatu summa ope annisos, ut iudicibus persuaderent, aut imposerent asserentes Alimentum Uxori constitutum juri Mariti obnoxium esse; quod enim ossibus hæret; nec a persona cui competit avelli, aut Alienari potest, illud nec juris Ministerio, aut fictione transfertur.* Where also he cites a Decision observed also by the Lord *Stair*, 13th *July* 1677, the Lady *Darsie* contra The Laird of *Darsie*, where the Lords found this, tho' there the Husband did not renounce expressly the *Jus Mariti*, and the Aliment was out of his proper Estate, and he himself destitute of an Aliment; none of which took Place in the present Case, which therefore must be much stronger: The Reason whereof is, That by the Constitution of the Aliment the Husband is fully denuded; as the Lords have also found in a parallel Case

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betwixt the Laird of *West-Nisbet* and the Laird of *Moristoun*, 17th March 1627.

The Lords Repelled the Objections against the Charger's Title, and found my Lady Kinnaird hath Right to all Annuities due, preceeding the Revocation by my Lord, and until the same was founded upon; the Sums now charged for being appropriate for an Aliment to my Lady: And found the Revocation could not exclude her Ladyship, in so far as concerns a suitable Aliment, since it was made use of, and in Time coming, during their separate Abode.

Actor Arch. Ogilvy. }
Alter Ro. Dundas.

Mackenzie, Clerk.

DECISION LXIII.

Eodem Die, Inter Eosdem.

MY Lady Kinnaird having been Executrix to the late Earl of *Aboine* her first Husband, and Tutrix-testamentar to the present Earl, and by vertue thereof intrometted, and also insisted in a Process for her Exoneration; it was further objected by the Suspender, That she, by several Receipts as Tutrix and Executrix, appears to be Debitor to the Earl, and that these *pro tanto* ought to be a Ground of Retention or Compensation.

Answered for the Charger, That this Charge proceeding upon a former Decreet *in foro*, Compensation cannot now be obtruded, the same being nowise competent for an illiquid Sum, after a Decreet for a liquid one; her Process for Liquidation and Exoneration as Tutrix and Executrix, being still a *Lis pendens*.

The Lords Repelled the Compensation founded on my Lady's Intromission as Tutrix or Executrix, the same being insisted for in a separate Process for Liquidation.

Actor Arch. Ogilvy. }
Alter Ro. Dundas.

Mackenzie, Clerk.

DECISION LXIV.

[10th February 1715.]

The Laird and Lady *Blackbarony*,

AGAINST

The Lord and Lady *Pitmedden*, and *Montgomery of Magbiehill*.

HUnters of *Hagburn* Elder and Younger, were Debtors to *John Peter of Whitslaid* in upwards of 3500 Merks, and Horning and Caption raised thereon; and *John Peter* assigned these Sums to *Elizabeth* his Daughter, *Magbiehill's* Grand-mother. And after this Debt was contracted and Diligence so done, *Hagburn* Elder made a Bond of Provision,

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Provision (afterwards Corroborate by his Son) in Favours of *Catharine Hunter* one of his Daughters for 3000 Merks, Young *Hagburn* having fallen into Difficulties, conveys his Estate to Mr. *William Wallace* his Brother in law; but the Price not having been applied for Payment of Creditors, *Elizabeth Peter* and *William Montgomery* of *Magbiehill* her Husband, obtained a Decreet in 1662 against Mr. *William Wallace*, as the Person who had unduly acquired their Debtors Estate; whereby he is decerned to pay to *William Montgomery*, or Mr. *William Lauder*, (who had acquired Right to *Catharine Hunter*'s Bond, and was Father to the Lady *Pitmedden*) the Sum of 2500 Merks, with the current Annualrent; or to such of them as by Multiple-poiding to be raised by him, should be found to have best Right. The Lady *Blackbarony* Daughter to Mr. *William Wallace*, with Concourse of her Husband, having called the Lord *Pitmedden* and the present *Magbiehill* his Grandfather's Representative, in this Multiple-poiding.

It was *Alledged* for *Magbiehill*, That the Ground of his Claim was a due and onerous Debt, constitute long before the Lord *Pitmedden*'s Bond of Provision granted by the common Debitor to his own Daughter, after all lawful Diligence was used against him for Payment of *Magbiehill*'s Debt; which, as such, is still preferable to a gratuitous and voluntar Bond of Provision.

Answered for *Pitmedden*, That *non apparet* that the common Debitor was Bankrupt when he granted the Bond of Provision to his Daughter, and two Charges of Horning, whereon no Denunciation followed, could not make him Bankrupt: So that the Bond of Provision fell not under the Act 1621.

Replied for *Magbiehill*, That as an onerous Creditor, and having done Diligence against the common Author, he only pleaded a Preference to the Lord *Pitmedden*'s gratuitous Bond of Provision, long subsequent in Date to the contracting *Magbiehill*'s onerous Debt and Diligence, which gives him a Legal Preference, without Necessity of reducing the Lord *Pitmedden*'s Bond of Provision on the Act of 1621: And *Hagburn* being Bankrupt, would be found sufficiently instructed by the Decreet 1662. Nay, *Magbiehill*'s present Claim makes him Bankrupt, so long as the Lord *Pitmedden* does not prove, That he had a sufficient Estate for Payment of that and all his other Debts. And the Viscount *Stair*, and all our other Lawiers agree, That such Bonds of Provision are not at all onerous, being granted after the competing Creditors Debts, tho' corroborate by the apparent Heir.

The Lords Found, That it is relevant and presumed that the common Debitor was Insolvent at the Time of granting the Bond of Provision, since no Effects appear for Payment of the onerous Debts prior thereto: And therefore found, That since the Debts in Mr. William Montgomery's Person and Diligences thereon, are prior to the Bond of Provision in the Person of the Lord and Lady Pitmedden, that therefore the said Mr. William is preferable to the said Lord and Lady Pitmedden.

Roberton, Clerk.

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Horn & Seton for }
Pitmedden. Alter }
Sir Ja. Nasmyth. }

DECISION LXV.

Eodem Die.

George Hamilton, and Hamilton of Grange his Father and Administrator,

AGAINST

Captain George Boswel.

IN an Action of Removing at the Instance of these Pursuers against Captain Boswel, it was among other Points Alledged for the Defender, That the Pursuers Title seem'd defective, he being only Infest on a Precept of Sasine granted by the Father as Administrator of Law for him; which is the same Thing as if the Pursuer being Major had granted a Precept for infesting himself, which could never be sustained.

Answered for the Pursuers, That our Custom has directed the Method of a Superior's establishing the Right of Property in his own Person, upon that Superveniency, viz. Either by obtaining Precepts from the Chancery, if the King be the Superior's immediate Superior; or by the Superior's granting a Precept for infesting himself in the Property, which was done here. And tho' thus it falls out that the Giver and Receiver of the Infestment is the same Person, yet that is no Matter; for one Man often *sustinet duplicem personam*; and in different Respects and different Rights, the same Person may both Give and Receive. And this Method of taking Infestment was solemnly found to be proper, in the Case of the Daughters of Mr. James Morton, 26th November 1668.

The Lords Repelled the Nullity, and sustained the Summons and Warning ad hunc effectum, to make the Defender liable to remove from the Lands at Whitsunday next, but not for violent Profits.

Actor Dalserf. }
Alter Troup. }

Dalrymple, Clerk.

DECISION LXVI.

[11th February 1715.]

Brigadeer Alexander Grant,

AGAINST

Lodovick Donaldson Writer in Edinburgh.

THE Laird of Grant Elder being Debitor by Bond to Lodovick Donaldson, Brigadeer Grant signs a Bond of Corroboration in the following Terms, viz. ' That seeing Lodovick did, at the Brigadeer's Request, and upon granting the said Bond, agree to supersede Diligence by Caption, &c. against Grant Elder, therefore, and but Prejudice of the principal Bond or Diligence thereon, but in Corroboration thereof the Brigadeer obliged him, &c. as Cautioners for Grant Elder his Father, to pay the said Sum against Martinmas then next, &c. providing

viding always, that *Lodovick* proceed in a Process of Furthcoming, raised upon an Arrestment laid on by him in the Hands of the Tenants of *Dundas's*. And provided, 2^{do}. That *Lodovick* do not assign the original Bond to any Person, and in case he recovered Payment from the Brigadier, he was to assign the original Bond and Diligence to him, for operating his Relief. This Bond was delivered by *John Stuart* the Brigadier's Agent, to *Lodovick*; who some Days thereafter offered back the same (not being pleased with it) to *John Stuart*, who refusing to receive it, he at last offered it to him under Form of Instrument; and thereafter transacted the Matter with *Old Grant*. The Brigadier upon this Intents Process against *Lodovick Donaldson*, concluding, That upon Payment of the Sum he should be obliged to assign to the Brigadier the original Bond against his Father, with the Diligences, &c.

Answered for the Defender, That it was still intire to him to give up the Bond to the Pursuer, since by the Conception thereof, there was no Obligation upon the Defender: For the Pursuer having only thereby become Cautioner for his Father; the Defender as Creditor may freely renounce such a Security when he pleases. 2^{do}. There was no *Synallagma* in this Case; but a naked Stipulation by the Pursuer under certain Conditions, till the Event of which there was no Obligation on him, and consequently, no Action competent. And the Conditions in the Bond being meerly *potestative*, and left optional to the Defender by the Conception of the Bond, the Pursuer is in the same State, as if no such Bond had been granted, until the Defender had asked Payment of him: For then, and not till then, could the Pursuer crave of the Defender to assign. 3^{io}. He having transacted with *old Grant*, before intending of this Process: It's scarce conceivable that a Cautioner tho' simply and not Conditionally bound, can hinder the Creditor from taking Payment from the principal Debitor. Nay, the Bond it self bearing expressly to be but Prejudice of the former (that is, That he might pass from the Second, and recover Payment by Vertue of the First Bond if he pleased) there appears nothing could keep him from Assigning.

Replied for the Pursuer, That by this way of reasoning, the Defender was to be free, and the Pursuer bound, which was absurd and unequal; and therefore the very keeping of the Bond, as it proved a delivered Evident: So it made this a *bonæ fidei* Contract, and obligatory upon the Defender to assign: For since it appears from the Nature of the *res gesta*, That the Meaning of the Parties was, That these Provisions should be Obligatory upon the Defender, that must be the Rule: For every Thing that is conceived in a Writ as a Condition, is not there to be interpreted as such, so as either to suspend the Obligation, or upon not Performance to extinguish it. And Viscount *Stair's Institutions*, Lib. 1. Tit. 3. § 8. says, That among voluntar Conditions, these are not to be numbered which consist in the natural Obligation of the Creditor, which he is positively obliged to perform; and so are not looked on by the Contractors, as an uncertain Event in his Choice. And therefore tho' such are often conceived as Conditions, and so may stop Execution, till the Creditors Part be performed, yet that is rather as the Failzie or Delay of the mutual Cause of the Obligation, than as the none Existence of the Condition,

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Actor Pat, Grant. }
Alter Col: Mackenzie. }

The Lords Found, The Creditor may make use of the
Bond of Corroboration, or repudiate the same at
his Pleasure.

Sir Ja. Justice, Clerk.

DECISION LXVII.

Eodem Die.

Mrs. Auchenleck,

AGAINST

Ensigne Millar of Mugdrum.

Lieutenant *Douglafs* draws a Bill upon Ensigne *Millar*, for paying to himself or Order 30 *Lib. Sterling*, as the Ballance of a stated Account betwixt them. This Bill is accepted, and by the Lieutenant Indorsed thus (*Pay to Grace Douglafs or Order the within Contents*) and further Indorsed by her to Mistris *Auchenleck* in the same way. The Acceptor suspends upon a Back-bond relative to, and restrictive of the Bill granted by the Drawer to him. And the Question being, Whether an Indorsation, not bearing Value received from the Indorser, does so denude him, that the Contents of the Bill could not be affected by his Creditors, or by an Obligation restrictive of the Bill?

It was *Alledged* for the Suspender, That we having scarce any Laws or Decisions touching the present Question, it falls naturally to be determined by the Laws and Practice of other Nations: And as to this the *French King's Ordinance* in 1673 is plain, That the Property of such a Bill is not transmitted, where Value is not mentioned to be received. And Mr. *Savary* a French Writer in his *Avis & Conseils sur le Commerce*, in the 34. *avis* states the present Case plainly, and determines it in the Suspender's Favours. 2do. Mr. *Scarlet* who does not confine himself to the Customs of any particular Nation; but takes in what's Law and Practice all *Europe* over, does in his 12th Rule of the 8th Chap. thus determine the present Case, (if the Indorsement have no more than, *pay for me to N. N.* And it be not expressed from whom the Value was received, then it's look'd on as no more than a single Order; and the Indorser is still considered as the principal Possessor of the Bill.) 3tio. Supposing the Indorser had actually gotten Payment from the Acceptor, and granted Discharge; and that upon Clearance betwixt the Drawer and Acceptor, the Drawer had got up this Bill; he would be no doubt justly founded against the Indorsers for the Repetition of the Money, because it would stood proven by the Discharge, that they had uplifted the Money by vertue of a naked Order, which did not bear that they had paid the Value, and which would necessarily force them to prove by his Oath, that Value was paid, tho' not exprest. And it's certain, there is still Recourse for Repetition where Value is not exprest; But none where it is exprest, unless the Repeater will redargue Value by the Receiver's Oath.

Answered for the Charger, That the *French King's Ordinance* is no Rule to us; for by it, a blank Indorsation in *France*, is void, which nevertheless by the Laws of *Scotland* and *England* is valide. And therefore

that Article abovesaid, being expressly contrary to our dayly Custom, ought not to be regarded. And in general it's a Rule with us and in England, That in all Bills Value is presumed to have been paid by the Possessor, except it be otherwise made appear, either from the Form of the Draught of the Indorsement, or from the Circumstance of the Persons; Or by Oath of Party. Thus 19th March 1707, Value was presumed to have been given by the Possessor of a Bill, tho' it bore not Value received, unless it were proven by Writ, or Oath that no Value was paid. Again, 26th January 1709, Swinton and Executor's of Bonnar contra Representatives of Thom: By an Order to deliver to a Bearer a Sum of Money, and take his Receipt; Value was presumed to have been given, tho' it did not express Value received. Further, where the Statutory Law of a Country allows Indorsations to be signed Blank, the Possessor is still to be looked upon as full Proprietar of the Contents. Now in the Act 1696 anent blank Writs, Indorsations of Bills are excepted: The Reason whereof, is, That they might pass blank through many Hands, for the Expedition of Commerce: Therefore by our Law blank Indorsations are Authorised. 2do. The Form cited out of Scarlet, (*Pay for me to N.*) is like a Factory or Mandate, and does not denude the Indorser of the Property of the Bill: But this cannot be applied to the present Case, where the Indorsments on the Bill are not in that Form.

Leith for Millar. }
Alter Spotiswood. }

The Lords Found, the Indorsation presumes Value,
and cannot be taken off, but by a contrary Pro-
bation.

Sir James Justice, Clerk.

DECISION LXVIII.

[16th February 1715.]

Lord Royston and Laird of Frazerisdale,

AGAINST

Haliburton of Pitcur.

THE Lord Royston, and Frazerisdale having wakned a Process against Pitcur, wherein as having Right by Progress from Sir George Mackenzie, they insist for Payment of the Annualrents of a Bond due by the late Pitcur to Sir George, (the principal Sum being payable to his Heir of Tailzie) Pitcur intents another Process against them, as being Executors by Progress to the said Sir George, for Payment of a Bond of 6000 Merks granted by him to Margaret Haliburton this Pitcur's Sister, and failing her to Pitcur himself, payable at the next Term, after their attaining Ten Years of Age; But the Bond being Lacerate in several Places, so that some of the Clauses and Provisions could not be read, tho' the Clause of Registration, Subscriptions, &c. were intire. And the Lords having found in an other Process, That the Bond was not probative. In this new Process, the same Grounds are again insisted on by the Lawiers on either Side; which nevertheless shall be here past over, because the Interlocutor hereto subjoined takes no Notice of them. But now further Pitcur having produced A

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Declaration under the Hand of my Lady Prestonhall, (who was first Married to Sir George,) importing, That she had procured from Sir George a Bond of 10000 Merks in Favours of her Friends, and that the said Bond was to subsist failing of Children of her Body with Sir George; but he having deceased, leaving Children, who also deceased before their Mother, and without Issue.

It was contended for the Executors, That granting such a Declaration was sufficient to make up the lacerat Clauses in the Bond, yet that the Import of it was, That if he had no Children by her, then this Bond was a kind of *fideicommiss*, whereby his other Heirs were to be burdened; but if he had Children, then the Condition of the *fideicommiss* failing, it was to take no further Place. And so it is expressly in L. 114. § 13. ff. *De legat. 1. cum quis erit rogatus (si sine liberis decesserit) per fidei commissum restituere, Conditio defecisse videbitur, si patri supervixerint Liberi.* And L. 17. § 7. ff. *ad Sen. Trebell.* Which says, That when a *fideicommiss* is left under that Condition, That it's extinguished, if the Person therewith burdened leave a Son, tho' that Son should afterwards Die: So that Sir George his Son having survived him, *defecit Conditio*, And the *fideicommiss* being once extinguished, by no Rule in Law could it revive.

Answered for Pitcur, That the Words of the Declaration are to be taken together, viz. X *I procured from Sir George a Bond in Favours of my Friends*) which joined with the subsequent Words (*that the said Bond was to subsist, &c.*) make up the two Cases, viz. Either that the Marriage Dissolved without Children; Or that the Children Died without Issue: For so Clauses of this Nature have been in our Law frequently interpreted; particularly 18th June 1680, where the Words of the Interlocutor are, (*The Lords found, That the Survivancy, and not the Existence of Children procreat of the Marriage, was understood, and therefore found the Sum in Question to return, seeing the Children procreat Died without Issue before their Mother.*) And it was Alledged Pitcur was in a much stronger Case, seeing by the Declaration, it appeared that Sir George his Intent was to prefer the Issue of his own Body by his Wife to her Relations, but upon that Failure to prefer his Wifes Friends for the Sums in the Bond to his other Heirs. 2do. That there is a Difference between the Condition (*si sine Liberis*) and that of (*failing Children*) This Last being of the Nature of a Substitution, which takes Place at any Time, whenever the Institutes fail.

Replied for the Executors, That tho' (*which failing*) do indeed import so much in Substitutions, and cannot there be otherwise explained; yet when such Words are insert as the Condition of a Bond, there they must still be understood, so as if the Granter should have Children surviving him, the Bond took no Place: Nor can it be otherwise understood in the present Case without manifest Absurdities; for so if Sir George's Descendents had failed after 500 Years, this Bond with it's whole Annualrents, would have been a Burden upon his Heirs.

The Lords found, That supposing the Clause in the Ladys Declaration, (viz. That the Bond was to subsist failing Children of her Body with Sir George) had been

Lord Advocate }
for Pitcur. Alter
Ro. Dundas.

insert in the Bond, yet the Bond could not be Binding in the Event, which hath happened, by the existing of Children in the Marriage, who survived Sir George but Died before the Lady without Issue.

Mackenzie, Clerk.

DECISION LXIX.

Eodem Die.

Walter Carmichael,
A G A I N S T
Lockhart of Cleghorn.

IN an Action for Mails and Duties against the Tenents of *Wester-millrig*, at the Instance of *Walter Carmichael*, he produces as his Title, a Tack from *Sandilands* of *Boall* Proprietar, in Favours of *Carmichael's* Predecessors, in *anno* 1618, which bears to be in Implement of another Tack in *anno* 1597, and acknowledges the Receipts of bygoners, and sets the Lands for 19 Years for an elusory Duty, containing also an Oblidgment to receive the said *Carmichael* and his foresaids, Kindly Tenents in the saids Lands, after the Ish of that Tack, for 40 *Lib.* of *Grassum*, at the Beginning of each 19 Years Tack; besides, the yearly Duty, and to reiterate and renew, as often as need beis, £*s.* upon which there is a Decreet of Registration in *Anno* 1637, and a Decreet of Suspension in *Anno* 1638, running in the Terms of the Tack.

On the other Hand, there is produced for *Lockhart of Cleghorn*, a Charter of the saids Lands, granted by *Carmichael* of *Bonington* Superior, with a Sasine, both proceeding upon a Disposition to *Cleghorn* from his own Lady and her Sisters, as Heirs to *Winram* of *Wiston* their Father, who had Right by an expired Comprising against *Sandilands*.

Alledged for *Cleghorn*, the Heritor, 1^{mo}. That the Tack was Null as wanting an Ish. 2^{do}. That tho' the Obligement to renew might have been good against *Sandilands* and his Heirs, yet it could not Militate against him a singular Successor.

Answered for the Tacksmen, 1^{mo}. That there was an Ish at the Expiration of ilk 19th Years. 2^{do}. That as singular Successors are Disinabled by Act of Parliament to break Tacks set to Tennants, so here there seems to be no Difference between a Tack and an Obligement to grant one, *Nam pactum de Affedatione facienda, et ipsa Affedatio parificantur*, providing they be both Cled with Possession. And it's as easy for a singular Successor to enquire into the one as the other, since neither is Registrated, and therefore equally presumed to be Unknown: For this he Quotes Two Decisions from Viscount of *Stair*, Pag. 314 in Fine, where this Case has been Determined, viz. *March 20th* 1629, *Laird of Finmonth* contra *Weems*, and another observed by *Hope*, viz. *Crawfurd* contra

Replied for *Cleghorn*, That such an Obligation to renew, is not a Tack; and it Pled as such, it is Null, as wanting an Ish: For tho' it might be good for the first 19th Years, after Expiring of the Original Tack, yet

no

no longer : Nay the Obligation, tho' Perpetual, might indeed bind Boall and his Heirs, but not a singular Successor ; Otherways such an Obligation would be more Favourable than a Tack it self, which nevertheless cannot stand before a singular Successor, if it want a Determinate Iss.

Archibald Hamilton }
for Lockhart, Alter Muir. }

The Lords preferred the Tacksman to the Mails and Duties for Bygones, and in Time coming, until Removing ; Reserving all Defences in the Removing, as accords.

Mackenzie, Clerk.

DECISION LXX.

Eodem Die.

Mr. Patrick Greenhill, and the other Creditors of Lyon of Banchry,

AGAINST

Mr. Walter Stuart of Capeth.

IN this Action as Marked 14th December 1714, where the Lords found, (the Priviledge of Restitution upon Minority and Lesion, was Competent to the Wife, in regard she was *vestita viro*, and immediately after Dissolution of the Marriage, Revoked and Intented Reduction, before Diligence done at the Instance of the Husband's Creditors) The same Point being again to be Debated, it was of new Alledged for Banchry's Creditors, that the Brocard, *contra non valentem agere*, &c. cannot be applyed to the Case, because there is here no Prescription but a Priviledge, which if not used within the Time allowed, Expires : And this it's Termed in the former Interlocutor, and in the Civil Law called *Beneficium Restitutionis* ; As also by our Lawyers, and Viscount of Stair, *Lib. 1. Tit. 6. per Tot.* And that Priviledges do so expire, appears from the Instances of Creditors not Adjudging within Year and Day, the Priviledge of Redemption, within the Years of the Legal, &c. 2do. Granting the Brocard took place, even with respect to a Priviledge, yet the Wife was *Valens agere cum effectu*, by revoking and raising Reduction, either of her self, or by the Judges Authority.

Answered for the Pursuer, That there was no Foundation for the Distinction ; Besides, That by the common Law, the *Quadriennium* ought for good Reasons be Prorogate, as appears from *L. 3. C. de Dolo*, moreover, the *Quadriennium* is not the Priviledge, but rather a Restraint upon it ; for since the Priviledge arises from common Equity, it should run as long as any other Right ; But since Men ought sooner to enquire into the Deeds of their Non-age, therefore Law introduced this Restriction. Now a Restriction of a Priviledge plainly falls in with Prescription, and is very like to the Ten Years Prescription in Tutors Accompts. 2do. That there was great Reason in this Case to Prorogate the Time, since Restitution was to be implored against the Husband himself, she being not only under that *Reverentia Maritalis* (and the Abstaining in Effect

is like the Donation, and the Consequence tending to a Dissolution of Affections, an Evil worse than the Patrimonial loss) but also Destitute of Counsel, and kept under the Ignorance of her Affairs ; yea, under a just and legal Authority, she her self being *sub cura* to carry on the Action, which Distinguishes the Case from Restitutions with Third Parties.

After Sir Walter
Pringle, Alter Gra-
ham.

The Lords adhered to their former Interlocutor, and Found the Privilege of Restitution, Minority and Lesion, was Competent to the Wife, to Restore her against Deeds done to the Husband, and others deriving Right from him ; in regard she was *vestita viro*, and immediately after Dissolution of the Marriage, she Revoked and intended a Reduction, before Diligence done at the Instance of her Husband's Creditors.

Gibson, Clerk.

DECISION LXXI.

[17th February 1715.]

Sinclair of Freeswick,

AGAINST

Sir James Sinclair of Dumbeth.

IN the Action at the Instance of Sinclair of Freeswick, against Sir James Sinclair, for Payment of a Debt owing to David Sinclair, from whom Freeswick had Right : The Defender pled Compensation for 500 Merks, as yet resting of a Bond of 1000 Merks granted by the said David Sinclair to him.

Answered for the Pursuer, That the Bond founded on was Null by Act of Parliament 1681, one of the Witnesses not being Designed.

Replied for the Defender, That David Sinclair had Homologate the Bond, by making Payment of the one Half of the Principal Sum, and all the Annualrents, and raising a Suspension of the Bond, in so far as concerned the other Half ; where his Reasons of Suspension were, the Payments abovementioned, and an offer to prove Compensation or Payment of the other Half by Sir James his Oath.

Deplied for the Pursuer, That when Deeds are Null *ipso jure*, and by positive Statute, there can be no place for Homologation ; which can only take place where the Deed is not Null *ipso jure*, but only Reducible and Quarrelable ; such as a Deed on Death Bed, or a Deed after Publication of an Inhibition, &c. But in the present Case and others like it, 'tis even *pars judicis*, nor to sustain Process upon such a Write, tho' no Objection were made by the Party : And the Form of the Writes being *juris publici*, private Parties cannot by an express, far less by a Tacite Consent, make that a formal Deed, which Law has Declared Informal and Null.

The

Actor Ro. Dundas, }
Alter Dun. Forbes. }

The Lords sustained the Acts of Homologation by Payment of the Annualrents, and the Half of the Principal Sum, and by raising a Suspension for the rest, and founding upon Reasons for further Payment, to Support the Bond, as a Valide and Probative Write.

Alexander, Clerk.

DECISION LXXII.

Eodem Die.

The Creditors of Mr. John Meinzie's Advocate,

AGAINST

Doctor Meinzie's and his Lady.

BY Contract of Marriage betwixt Doctor Meinzie's and his Lady (second Daughter to Meinzie's of Weem) Mr. John Meinzie's the Father, obliges himself to Provide 52000 Merks, to his Son the Doctor, and the Heirs of the Marriage, &c. wherein also a Liferent of 2000 Merks is Provided to the Doctor's Lady; which in Case of Children of the Marriage is Restricted to 100 Lib. Sterl. with Reservation also of the Liferent of 22000 Merks to Mr. John himself and his Lady: The Doctor's Lady's Portion being 8000 Merks, and payable to the Husband, not to the Father. Mr. John having shortly thereafter become Bankrupt: In the Ranking of his Creditors, such of them as were prior to the said Contract, repeated a Reduction upon the Act 1621, alledging, That the Jointure was Exorbitant, because the Father who is the Obligant, was at the Time of Contracting Insolvent, and therefore it was Fraudulent in him to make such Provisions in Prejudice of his Creditors, which therefore ought at least to be Restricted to a Competent Provision.

Answered for the Defenders, That Law only presumes Fraud from a Deed's being Gratuitous, where it is so; Not only on the Part of the Obligant, but of the Receiver, therefore whatever may be Objected against Mr. John, yet as to the Doctor's Lady and her Friends, who knew nothing of his Condition, the Contract was fair, and the Marriage made it Onerous, as to the Liferent; as was Decided 19th January 1676, *Stamfield contra Brown*, where the Contract was the Liferent even of all the Husband had. 2do. In the present Case the Liferent, considering the Tochar and the Lady's Rank, can never be Judged Exorbitant. 3tio. Tho' the Tochar was only payable to the Husband, not to the Father, yet this makes no Alteration; for to whomever it was payable, the Lady was obliged, and actually did Pay, and to whomever it was payable, she was to have neither more nor less Provision.

Replied for the Pursuers, That it's unjust the Lady should in Prejudice of Creditors, enjoy so ample a Jointure as 2000 Merks, when she brought no more with her but 8000, and which did flow by a Voluntar Conveyance from Mr. John Meinzie's, who was *Lapsus*, and the Payment Con-

trived to be made to the Doctor, lest the Creditors might have affected the same, if payed to Mr. John himself, as is usual in such Cases. So that the Conveyance of the Funds made to the Son, was the very Onerous and Mutual Cause of the Tochar, which the Doctor's Lady got along with her; and which Funds were truly the Creditors Money, since Mr. John had nothing of his own to Bestow.

Actor Gray, & Robert
Dundas. Alter Graham
& John McLeod.

The Lords Fand the Lady's Provision both Onerous and Suteable.

Sir James Justice, Clerk.

DECISION LXXIII.

Eodem Die, Inter Eosdem.

IN the abovementioned Cause, The Creditors having further insisted to Reduce certain Securities granted by the said Mr John for his Good-Daughter's Provision, upon the Act 1696, which declares all real Rights to be Reckoned as granted from the Date of the Infeftments, and not from the Date of the Deed, whereupon the Infeftments is to follow, when the Granter is under the Qualifications mentioned in that Act: They alledged, That tho' the Date of the Sasine be not within the 60 Days of the Disponer's being Bankrupt, in the Terms of that Statute; yet the Registration of the Infeftment is within the 60 Days, and this being the Deed that makes the same Publick, and renders it Effectual, must be the Meaning of the Act, when it Speaks of the Date of the Sasine; For thus a Posterior Infeftment first Registrate, will be preferable to a prior Infeftment thereafter Registrate.

Answered for the Defenders, That the Act 1696, being introduced *Preter juris Communis regulas*, and having a Retrospect to all Deeds done within 60 Days before the breaking; and a further Presumption that Deeds, whereupon Infeftment may follow, are of the Date of the Infeftments to be taken thereupon, therefore the Words of the Law are most strictly to be followed. Now the Statute Speaks nothing of the Date of the Registration, but of the Sasine only, and the Registration is a distinct Act from the taking the Sasine, and therefore would have been noticed by the Act, had the Legislator intended to have made the Presumption draw down so far: And then Parties would have been put upon their Guard to Registrate their Sasines, so soon as they were taken: But the Law that allows 60 Days standing in Force, it was Optional to the Lady to Registrate any Time within that Space.

Replied for the Pursuers, That whatever be the Words of the Law, yet Judges must so Interpret them, as that they be not rendered Elusory and Ineffectual, for the Ends Proposed: And the Fraud here being so Palpable, and the Registration delayed to the very last of the 60 Days, *res ipsa loquitur*, that this *turpe lucrum est extorquendum*.

The Lords Fand, That in the Case of the Wife, the 60 Days relating to Deeds made by a Bankrupt, Commences

Attor Gray, & Robert
Dundas, Alter Graham
& McLeod.

Commence from the Date of the Sasine, and not
from the Date of the Registration; And therefore
Repelled the Reasons of Reduction.

Sir James Justice, Clerk.

DECISION LXXIV.

Eodem Die.

Mrs. Agnes Nicolson,

AGAINST

Sir James Sharp of Stoniehill.

THe Deceast Sir William Sharp of Stoniehill, Grand-Uncle to the said Sir James, having Married a Lady, with whom he got a considerable Portion, and having no Children, grants Bond to her for 10000 Lib.Scots, payable and bearing Interest after his Decease; and thereafter grants a Disposition to several Debts resting to him, Constitute by Bonds, Tickets, Accompts, &c. in Favours of Sir William Sharp of Scotsraig his Nephew, and Father to Sir James: Which Disposition bears this Narrative, *That his Nephew stood bound for him in several considerable Debts.* After old Sir William's Decease, his Nephew did not represent him, but paid many of his Debts, taking Assignation thereto in Name of George Howat his Trustee, who thereupon leads an Adjudication on Old Sir William's Estate. And Agnes Nicolson the Old Lady's Niece and Assigney, did also within Year and Day, lead an Adjudication upon the abovementioned Bond, and now insists in a Process of Mails and Duties, wherein Compearance being made for Sir James Sharp Son to Sir William the Younger, he produces for his Title the said Adjudication, and craves Preference, because Howat's Adjudication was led for true Debts, and Bonds of Borrowed Money; whereas Agnes Nicolson's Adjudication is a Gratuity, which ought to be Postponed to Onerous Debts.

Answered for Mrs. Nicolson, That she only craved to be admitted *pari passu* with Howat's Adjudication; and that Sir James could not object against her Debt, because Old Sir William had left sufficient Means to pay all his Debts, and this Bond also in Favours of his Lady. And further, That Young Sir William had accepted the said Disposition to a vast Sum more worth than all the Heritage: So that it was presumeable he had bought in his Uncle's Debts with the Effects of the Disposition.

Replied for Sir James, That the naked Acceptance of the Disposition could never import Extinction of his Adjudication, in regard it was only a Right in further Security, nowise innovating the Constitution of the Debt secured; and Sir James and his Father were under no Obligation to use Diligence, either implicitly from the Nature of the Right, or expressly from the Tenor thereof: And therefore Mrs. Nicolson ought to prove his Intromissions: In which Case, he offered to prove the same was applied towards Payment of other Debts due by Old Sir William,

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than what was contained in *Howat's* Adjudication, and therefore must be imputed in Payment of these other Debts.

Duplied for *Mrs. Nicolson*, That the Disposition being not only accepted, but effectually made use of, it is not relevant for *Sir James* to say, That he can be found liable to hold Compt for no more than for what shall be proven he did uplift, unless at the same Time he produce the Bonds, Tickets, &c. which are disposed, and say they are yet unpaid and undischarged. 2do. It was presumeable, That young *Sir William*, who was apparent Heir to his Uncle, but refused to Represent him, and yet did accept and make use of this Right, has recovered Payment of all these Debts, unless he produce the Documents of such as are not recovered; and this chiefly because he accepted this Right for his Relief of Engagements: And therefore seeing he refused to Represent, he had no further a just Title to these Evidents as his own, but for his Relief only, and *quoad ultra* he was but Trustee for *Sir William's* other Creditors.

Astor Hay. }
Alter Nasmith. }

The Lords found the Defender must Compt for such of the Debts in the Disposition, whereof the Instruction came to his Father's or his own Hands, to extinguish his Adjudication. Vide 17th June 1715.

Mackenzie, Clerk.

DECISION LXXV.

Eodem Die.

John Watson of Sauchton,

AGAINST

Thomson of Corsehill, and John Tod Merchant in Glasgow.

RObert Hamilton Younger of *Wishaw* having Adjudged the Lands of *Monkland*, he and *Monkland* at length entred into a Minute, whereby *Wishaw* is obliged to dispoise the Adjudication to *Monkland*, and heto pay a certain Sum therefore at diverse Terms, declaring always that this is only a Corroborative Security, containing an Irritancy in case of not punctual Payment at the respective Terms, viz. *That the Minute should be void.* *Monkland* accordingly made some partial Payments, but did not keep his Days; and in the mean Time *Gabriel Thomson* and *John Tod*, *Wishaw's* Creditors, laid on Arrestment in *Monkland's* Hands, and obtained Decrees of Furthcoming; which *Monkland* suspended upon double Poinding: And thereafter *Watson of Sauchton*, another Creditor of *Wishaw*, Adjudges *Monkland's* Estate, as belonging to his Debtor by vertue of the foresaid Adjudication, and now insists in a Process of Mails and Duties against *Monkland* and his Tenants. In which Process *Thomson* and *Tod* compearing, and craving Preference, because of the Priority of their Diligence:

It was *Alledged* for the Adjudger, 1mo. That an Adjudication being an Heritable Subject, is only transmissible by such Diligence as is capable to affect Heritage, and so not by an Arrestment. 2do. No Man can have

have Right to the Money due by *Monkland*, except he who is capable to dispoſe *Wiſhaw's* Adjudication; ſeeing *Monkland* is bound to pay upon *Wiſhaw's* Diſpoſing. Now an Arreſter having no Title to *Wiſhaw's* Adjudication, can never diſpoſe it, and therefore he can have no Claim to the ſaid Money, but *Wiſhaw's* Heirs, or *Saughton*, who hath Adjudged. 3^{tio}. The above-mentioned Minut was only a Corroboration of the Adjudication; beſides, that *Monkland* not having paid at the Terms prefix'd, all the Effect of the Agreement is, That he muſt have Allowance of his partial Payments out of the Sums in the Adjudication.

Answered for the Arreſters to the *First* and *Second*, That there being no Infeſtment on the Adjudication, nor the ſame expired, whereby it became a Right of Property, the Sum for which it was led was ſtill arreſtable; for ſo it is in the Caſe of Heritable Bonds whereon no Infeſtment hath followed. To the *Third* *Answered*, That ſuch irritant Clauſes are never ſtrictly interpreted, but ſtill purgable by Payment *cum omni Cauſa*. And as to the Minute's being Corroborative, *Answered*, That a Party's retaining Right till he be paid, does not alter the Nature of the Sums to be paid; but the Nature of the Debt is innovate, tho' the Creditor has an Objection competent to him againſt Diſpoſing till Payment, which makes not the new ſtipulate Sum to be an heritable Debt, the Minute being a new Bargain. Nor is it unknown in Law, that an heritable Right may be a Security for a Subject of its own Nature Moveable, as in the Caſe of bygone Annualrents of heritable Sums; as was found 18. February 1676, *Wauch* contra Dr. *Jamison*. *Laſtly*, The Sum agreed on being in the Minute declared payable to *Wiſhaw*, his Heirs, Executors, or Assignies; this plainly ſhows *Wiſhaw's* Deſign, that it ſhould be moveable: And there is here no Difference betwixt Successors and Executors; for as whatever is an heritable Debt in the Perſon of the Deſunct, and would belong as ſuch to his Heirs, may be affected with all heritable Diligence. So what is Moveable in the Debitor's Perſon, ſo as it would belong to his Executors, may be affected with moveable Diligence.

Replied for the Adjudger, 1^{mo}. That an Adjudication does not fall under the Comprehension of the Term *Bond*, or *Obligation*; and it is only Money due by Bonds that the Act of Parliament declares to be either Adjudgable or Arreſtable: Beſides, the Subject of an Adjudication is not properly Money but Lands, which cannot be arreſted. 2^{do}. That it is not here pled, that the Minut ſhould be ſo void as *Monkland* ſhould have no Allowance of what he paid, which were rigorous; but when he gets Allowance, *nihil illi deeſt*. And as to a Sum's being Moveable, tho' heritably ſecured, *Replied*, That bygone Annualrents of an heritable Sum are Moveable, becauſe they are held as uplifted, being already payable; but it is otherwiſe in the preſent Caſe, where *Monkland's* Obligation to *Wiſhaw* was expreſſy Corroborative, and now in the Event the Adjudication is the only ſubſiſting Security for the Money. And as to the Difference betwixt Successors and Creditors, *Replied*, That whatever a Man's Deſtination may be with reſpect to his own Representatives, or however conſtructed; yet the Intereſt of Creditors Strangers does not fall under ſuch Interpretation: Nor is it a *Queſtio voluntatis* with them, ſince they lead their Diligence upon the Faith of what is acted and compleat,

compleat, and are not much concerned with what may be in the Intention of their Debitor.

Actor Arch. Hamilton.
Alter Boswell.

The Lords preferred the Adjudger to the Arresters.

Robertson, Clerk.

DECISION LXXVI.

Eodem Die.

John Warrander and Robert Stirling,

AGAINST

John Alexander and Adam Thomson.

Duncan Luttit Skipper in *Prestonpans*, by his Bill of Loading, 8th January 1712, obliges himself to deliver to *Robert Stirling* Merchant in *Rotterdam*, or Order, 20 Bags of Goods; and on the 20th of January thereafter delivers the Goods to *Richard Sheriff* in *Prestonpans*, and takes his Receipt of the Particulars, viz. Muslins, Pepper, Callicoes, &c. for which *Sheriff* obliges him to hold Compt so soon as *Luttit* returned to *Rotterdam*, which was in May thereafter, he Indorses *Sheriff's* Receipt to *Stirling*, and he to *Warrander* his Correspondent here. *John Alexander* and *Thomson* his Cedent coming to know that there had been some Goods lodged in *Sheriff's* Hand by *Luttit*, arrests the same upon a Dependance; and thereafter the Cause being Advocate from the Inferior Judge, the Question came to turn upon this, Whether the Goods were presumed to belong to *Luttit*, (and in Consequence to the Arrester) or to *Stirling*? And,

It was *Alledged* for the Arrester, 1mo. That he was founded in the general Rule of Law, That Possession presumes Property; and therefore since the Goods were lodged in *Sheriff's* Hands by *Luttit*, they were presumed to belong to him. And 2do. The Receipt being taken in his own Name, and *Sheriff* bound to be accountable to him, the Presumption was in Favours of the Arrester, that they were *Luttit's*, unless the contrary were clearly instructed.

Answered for *Stirling* and *Warrander*, That tho' the Rule takes Place in Moveables in general, yet not in this Case; for a Skipper's Possession by Goods being on Board of him, presumes not Property; but that the Goods belong to the Merchant, and the Skipper hath only naked Custody and Retention, like a common Carrier. 2do. To what Purpose should the Indorsation of *Sheriff's* Receipt have mentioned that the Goods were *Stirling's*, seeing all that was designed by it, was a Warrant to *Sheriff* to deliver them: So that the only Design seems to have been that *Luttit*, should satisfy his Trust, and *Stirling* have his own Goods and therefore the Order was conceived in plain and general Terms.

The Lords Found, That since *Luttit* by his Bill of Loading, dated the 8th of January 1712, was obliged to deliver to *Stirling*, or Order, 20 Bags of Goods; and having

Aftors Ro. Dun-
dass and Jo. Falcon-
ner. Alter Ja. Fer-
guson. }

having on the 20th of the said Moneth delivered to Sheriff 5 Peices of Callico, Six Peice of Musline, and 14 Bundles of Pepper, for which he took Sheriff's Receipt in his own Name, and Oblidgement to hold Compt to him for them. And since Luttit in May thereafter, did order Sheriff to deliver the saids Goods or Prices to Stirling or Order, and took no Discharge of the Bill of Loading from Stirling, That these Circumstances were sufficient to infer a Presumption, that these Goods in Sheriff's Receipt were a part of the Goods contained in the Bill of Loading to Stirling; and to elide the Presumption of Luttit's Property thereof by his Possession: Or his taking a Receipt from Sheriff in his own Name.

Roberton, Clerk.

DECISION LXXVII.

Eodem Die.

Viscount of Primrose,

AGAINST

The Earl of Roseberry.

THE late Viscount of Primrose did Nominate several Friends to be Tutors and Curators to his Son, with Power to them or the Major Part of those who should accept and be Alive (his Lady being always *sine qua non*) to exerce, &c. And in case of my Ladys Marrying again, the Earl of Roseberry is appointed *sine quo non* in her Place. Upon the present Viscounts passing the Age of Pupillarity, all the Tutors declined to be Curators (which they are allowed to do by the Act of Parliament 1696) except the Earl of Roseberry, and therefore the Viscount takes out an Edict for choosing new Curators, which coming in by way of Advocacion;

It was *Alleged* for the Earl, That the Case was now to be considered in the same way, as if it had occurred in the Question of the Acceptation of the Tutors, and by the Nomination, if none had accepted but the Viscountess who was Tutrix *sine qua non*, the Nomination would have held, since not only no *Quorum* is named (and so any one who accepted is fully impowered (but also all Dubiety is removed by the Words of the Nomination, viz. *The foresaids Persons, or such of them as shall accept*) which can have no other Import, but the giving the Power to any one who should accept, since *Pluralitas diversos effectus respiciens, in singularitates resolvitur*. Thus in Law, (*si sine Liberis decesserit*) tho' a plural Expression, yet is fully Answered by one Child.

Answered for the Viscount, That the Alternative (Or the major Part of the Acceptors) does as really and effectually determine a *Quorum* as if a particular Number had been named; for thereby certainly it was the Father's Intention, that at least as many should accept, as there still might be a Majority, for preventing any Stop in the Managery. And this

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could

could not happen in any Number under Three, since no Number under that contains a Majority. So that here indeed the *Quorum* in some Manner is less ambulatory or indefinite; since it may be less or more according to the Number of the Accepters: But this is certain, and is plainly a Demonstration, that the smallest *Quorum* must still be the Majority of the Accepters, and consequently cannot be under Two, nor the Accepters less than Three. So that here the Case is the same as where Curators are named, and a particular *Quorum* expressed, and not so many Accepters as make up the *Quorum*; in which Case the Curatory becomes Null, 25th January 1672, Sir James Ramsay contra *Maxwel*. Further that the Quality of *sine qua non*, did of it self likewise show, that it was not intended that the Tutorship should subsist in that one Person; for a *sine quo non* necessarily supposes, that there must be other Tutors acting with a less Power. Lastly, That there is a very reasonable Distinction in this Case betwixt Tutorship and Curatory: For tho' it may be presumed the Father's Will *in dubio* to prefer any one of the Tutors nominate, to a Tutor in Law: Yet in the Case of Curators who are only to concur and Act with the Minor, Law has considered him to have a sufficient Judgement to make a fit Choice.

Actor Tho: Kennedy. Alter Boswel. }

The Lords found, That in the Case which hath happened, the Father's Nomination hath failed, and that the Viscount is at Liberty to choose his Curators.
Makenzie, Clerk.

DECISION LXXVIII.

[18th February 1715.]

The Lord and Lady Lindoris,
AGAINST
Sir James Steuart of Burra.

TH E Decease Sir Archbald Steuart of Burra having no Contract of Marriage with his Lady, disposes to her a little after the Marriage, the Liferent of his whole Estate, and the Property of all his Money and Moveables; but 6 Years thereafter he makes a new Settlement far short of the former, upon which she was Infeft. She now with Concurrence of the Lord Lindoris her present Husband, pursues Sir James Steuart her Son, for Implement of the first Disposition.

Answered for the Defender, That the first Disposition never came to be a binding Obligation upon the Husband till delivery, it being always in his Power to cancel and destroy it; and by the Parity of Reason to alter or Diminish it by any subsequent Deed.

Replied for the Pursuers, That there can be no Dispute in this Point, not only by Reason that the Husband is *Custodier* for the Wife during the Marriage, but that the Nature of the Writ is such, as could only take Effect upon the Decease of the Husband, and therefore the Writ was once a fair constitute Obligation betwixt them, whether delivered or not: Nor could he any more conceal it, than he could a Contract of Marriage, it being *Donatio propter Nuptias*, which comes in place of a Contract, and has the Marriage it self and the natural Obligation on the Husband to pro-

provide his Wife, for the Cause thereof; which is certainly Onerous. 2do. By our constant Practick such Provisions have been found irrevocable; As 28th March 1635, Lady Lauriston, contra Lady Dunpace, Where the Lords expressly found, That *tam dos quam Donatio propter nuptias*, might be constitute between Man and Wife after Marriage; and which being so constitute was not revocable, being done in Competency of Proportion. Which Decision further Determines, That where there was once a prior Bond made betwixt the married Persons, that behoved to be repute in Place of a Contract of Marriage.

Actor Lord Advocate and Graham.
Alter Nasmyth and Ferguson Senior.

The Lords found the Bond of Provision, tho' lying by the Granter, the Time of his Decease, not revocable, except in so far as it exceeded a competent Provision.

Mackenzie, Clerk.

DECISION LXXIX.

Eodem Die.

Jean Pitcairn,
AGAINST

Euphan Deans, and Preston of that Ilk, a Justice of Peace.

Ralph Morton Writing-master, being under Diligence for a Debt contracted by Jean Pitcairn his Wife, before the Marriage; Euphan Deans Relict of Robert Newlands Glover, becomes Caution for the same, and Morton having Absconded, and Mrs. Newlands distressed for the Debt, she obtains a summar Warrant from a Justice of Peace, without calling or certiorating Mrs. Morton, to Imprison her till she should relieve her of her Cautionry: And the *Because* in the Warrant is, That Mrs. Morton had circumvented Mrs. Newlands, and was guilty of a premeditate Cheat and Breach of Trust, was in *meditatione fugæ*, &c. In an Application to the Lords by Complaint;

It was *Alledged* for the Plaintiff, *imo*. That a Justice cannot grant a summar Warrant for Imprisonment, till the Party be cited and brought before him, except only where there is appearance of Breach of the Peace, as is plain by the Instructions to the Justices. 2do. That she being *Vestita viro*, could not be imprisoned for a civil Debt; and tho' she could, a Justice of Peace is not a competent Authority to Imprison for such a Cause. 3tio. That this was of very bad Consequence, for if a Justice of Peace can grant Warrant for summar Imprisonment, upon no better Instruction, than a Parties signing a Complaint, all other Diligence will for ever cease: And poor People who are not able to find Cautioners, must remain perpetually confined, and exposed to Humor or Ignorance.

Answered for Mrs. Newlands, to the *First*, That upon any signed Complaint of a Crime, such as Adultery, Cheating, &c. which are not done by Violence (and therefore not properly Breaches of the Peace, but simple Transgressions of the Law) the Justices can attack till Bail be found; And even in capital Crimes, tho' they cannot judge, they can

Imprison, and present the Criminals to the proper Court; especially since they were put on the same Footing with the Justices in England, Where it's nottous that almost all Processes begin with arresting the Person. To the *Second*, That the Argument militates against Mrs. Morton, Since her being *vestita*, was the very Reason for using this Method, to attack her for Fraud, because, she could not be reached in common Form. To the *Third*, That there was no Reason to fear these Consequences, Since, *1mo*. That it can scarce happen in an Age that such a complicated Injustice should be attempted. *2do*. No Body who can by ordinary Diligence force Payment, will rest satisfied with a Justice's Warrant, which at most lands in Caution.

Actor Boswel. }
Alter. }

The Lords found, That the Warrant granted by the Justice of Peace was illegal, being for Imprisoning a married Wife, for a civil Debt. And therefore found that the said Justice of Peace was liable in Expences and Damages to the Plaintiff.

Robertson, Clerk.

DECISION LXXX.

Eodem Die.

Murray of Deuchar,

AGAINST

John Grierson Son to Sir Robert Grierson of Lagg.

John Grierson having accepted a Bill drawn by *John Hunter* and *Robert Douglass*, payable to *Michael Coulter* Merchant in *Glasgow*, and getting a Bill for the Equivalent from *Douglass*; the said *Douglass* pays *Coulter*, and takes up the Bill from him, and an Indorsation to himself, and thereafter Reindorsed it to *Coulter*: But having deleted the Reindorsation, he indorsed again of new in Favours of *Deuchar*, who (after the Bill had lain over more than 5 Years) raises a Process thereon against *Grierson* the Acceptor: Where

It was *Alledged* for the Defender, That tho' Bills of Exchange, when recently granted, and pass in Way of Commerce for Money advanced to the Drawer or Indorser at the Time, are much priviledged, and looked upon as ready Money; yet when they ly long over, or are given for Satisfaction or Security of prior Debts, then any Defence competent in other Cases are competent in this, and the Person to whom the Bill is payable or indorsed, is only looked upon as a common Assigney.

Answered for the Pursuer, That the lying over of a Bill for some Time, does not prejudice it: On the contrary, Bills of Exchange, tho' Holograph, do not fall under the statutory Prescription of 20 Years, as is observed by *Sir George Mackenzie* on that Statute, where he tells, That the Parliament did expressly refuse to comprehend Bills of Exchange in that Act.

Replied

Replied for the Defender, That he did not plead that the Bill cannot be the Foundation of an Action, but that it having lien over so long without any Diligence done on it, *Deuchar's* Acceptance of it must be with the Burden of all the Defences that were proponable against *Douglafs* himself, if the same had continued in his Person, and as he had been Pursuer ; and therefore, as Compensation would have been a good Defence against *Douglafs*, so must it be against *Deuchar*.

Aftores Ro. Dundas }
& Arch. Hamilton. }
Alter Isla.

The Lords Found, That the Bill not being Protested against the Acceptor, nor Diligence done thereon for Payment during the Space of 5 Years, Deuchar the Indorsee is only to be considered as a common Assigney.

Robertson, Clerk.

DECISION LXXXI.

[19th February 1715.]

Catharine Stevenson and Mr. *James Gillon* Advocate, her Husband,

AGAINST

The Children of the deceased Baillie *Fife*.

Against the Interlocutor pronounced in this Cause the 3d Instant, finding, *That in respect there was but one Substitution to the Fiar in the Heritable Bond, upon the Death of the said Fiar, the Succession, by the original Bond, would have devolved upon the Executors of Alexander Stevenson, in whose Favours it was granted: Catharine Stevenson and her Husband do now Reclaim upon several Grounds before proponed, and now upon this separate Ground, That granting the Succession would devolve upon the Executors of Alexander Stevenson, as Heirs of Provision to Susanna the Fiar, yet in this View Baillie Fife's Children must subsume, That Susanna's Aunts, as her Executors, or nearest of Kin, were served Heirs of Provision to her. Which they had not done; nor were they of any Blood either to Alexander or Susanna, being Children of Baillie Fife by another Marriage: So that upon the Foot of the above Interlocutor Catharine Stevenson and her Brother, are the only Executors to both, and thereby preferable to the Fifes, who had produced neither Confirmation nor Service, as Heirs of Provision in the Person of the Aunts; nor had they connected any Title in their Person from these Aunts, so as to exclude Catharine's Right of Blood, which, together with the Title she produced from the Heir, was sufficient ad fundandam litem, since she could always Confirm before Extract.*

Answered for the Fifes, That *Alexander Stevenson's* Sisters needed neither Service nor Confirmation, because the Tutor had saved them the Trouble, by taking the Bond to them *Nominatim*, which they accepted of, and disposed their Shares accordingly: And tho' a Tutor cannot by any Deed of his alter the Course of his Pupil's Succession, yet he can so far better his Pupil and Successors their Condition, as to save them the Trouble of Service or Confirmation, by taking the Right to the Successors

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fors *Nominatim*, who would have succeeded by vertue of the general Word *Executors*, contained in the first Bond: So that in this Case the Substitution taken *Nominatim* to *Alexander's* Executors, on whom the Lords have found the Right devolved, established the Title sufficiently in the Person of these Executors, from whom the Children of *Baillie Fife* derive their Right.

Advers Sir Wal. Pringle
& Se. Alter Ja. Hamilton
& Ro. Dundas.

The Lords Adhered to their former Interlocutor, but remitted to the Ordinary to hear Parties Procurators upon this Point, viz. If the Succession by the original Bond would have devolved upon the Executors of *Alexander Stevenson*; if *Catharine Stevenson* confirming, or as Executors Designative serving Heir of Provision before Extract, could be preferred to *Baillie Fife's* Children, they not having shown any Right by Confirmation or Service?

Sir James Justice, Clerk.

DECISION LXXXII.

Eodem Die.

William Douglass Gadger,

AGAINST

Colonel John Erskine.

Colonel *Erskine* having drawn a Bill upon his Salt Grieves for 420 Bolls of Salt, payable to *Archbald Ronaldson* Merchant in *Leith*, the Bill is indorsed to the said *William Douglass*; but at the Time of granting the Bill the Colonel took Bond from *Ronaldson* for 200 Bolls of Meal, the Price whereof was equivalent to that of the 420 Bolls of Salt; neither Party having performed their Engagements, and *Ronaldson* breaking in the mean Time, *Douglass* the Indorsee, after 5 Years and odd Months, protests the Bill for not Acceptance, and insists against the Colonel for Delivery of the Salt, or Payment of the Price thereof: And the Lord Ordinary having found, That the Bill, not being a Money Bill, was only of the Nature of an Assignment, and that whatever was competent against *Ronaldson* the Indorser, was competent against *Douglass* the Indorsee.

Against this it was Reclaimed and Alledged for the Pursuer, That where the Law makes no Distinction, neither can we. Now *de praxi*, *Inland Bills* for Fungibles, pass as current as Money Bills; nay, by express Act of Parliament, 36 Parl. 1696, Priviledge of Foreign Bills is extended to *Inland* ones, without Distinction, whether drawn for Money or other Fungibles: And were it otherwise, the Currency of Commerce would be very much stopped 2do. That this Bill had all the Requisites of a Bill of Exchange, viz. A Drawer, a Person on whom 'tis drawn, and another to whom 'tis payable, and that for Value received; therefore it must have the same Priviledges.

Answered

Answered for the Defender, That as regularly all Objections are good against the Assigney that are good against the Cedent; so there is here no Exception from the Rule: For tho' Bills of Exchange be indeed excepted, yet the present Bill can never have the Priviledge of these. For by that Way of Arguing, even a Receipt of Goods would not be good against an Indorsee, if the Receipt were not marked upon the Back of the Precept. And the Reason of the Difference is, That Bills of Exchange are in place of Money, and contrived to save the Trouble of Portage, and therefore must have a Course as free as it has: But Bolls of Salt or the like, cannot pass in that Manner, nor is it useful for Commerce that they should; and therefore have not the Priviledge of Bills, but are only as Assignations: Nor does the Act 1696 give them that Priviledge. For, 1770. The Act only concerns Diligence upon Bills, but determines not how far Exceptions competent against the Cedent, are good against the Assigney. 2do. That Act concerns only Money Bills; for it only extends the Act 1681 anent Foreign Bills, to Inland ones of the same Nature; but the Act 1681 concerns only Money Bills, as is plain from its Rubrick, Narrative, Statutory Part, &c. Consequently the Act 1696 concerns only Money Bills also: And therefore the saids two Acts rather argue against the Pursuer, thus, That however our Laws have justly given Priviledge to Money Bills, yet the Legislature never thought it useful or necessary to allow the same Priviledge to Precepts for Goods. To the *Second*, *Answered*, That this Bill wants an Essential for giving it the Priviledge acclaimed, viz. That 'tis not a Money Bill, and no others are favoured by the Law.

After Sir Thomas Wallace. Alter Robert Dundas.

The Lords Found, That the Bill not being for Money, but a Salt Bill, and not Protested, nor Diligence done thereon for Payment, during the Space of 5 Years and some Months; therefore William Douglass the Indorsee was only to be considered as a common Assigney.

Robertson, Clerk.

DECISION LXXXIII.

Eodem Die.

Fullarton of That-ilk, and Others,

AGAINST

The Earl of Kilmarnock, the Laird of Ochiltrie, and the Earl of Dundonald's Chamberlain.

IN this Cause, as marked 19th November 1714, the Lords having found, That the Errors therein-mentioned were no Foundation for Damages; there is now a Reclaiming Petition given in by *Fullarton*, and *Answers* thereto by the Justices and *Dundonald's* Chamberlain; wherein most of the Grounds above-deduced are again Represented: But the Petition points chiefly at the Chamberlain, whom it Terms *improbus litigator*, and therefore concludes him Punishable in the Terms of § 1.

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Inst.

Inst. de pæn. tem. litig. viz. Ut damnum & impensas litis adversario suo inferre cogatur.

Answered for the Chamberlain, That by the old Roman Law, the *Actio Calumniae* was competent for restraining of groundless Pleas, which run in Desuetude; so that in *Justinian's* Time, nay by the very above-cited *Parag.* the *Juramentum Calumniae* succeeded; and the Plaintiffs having omitted to put this Chamberlain to his Oath, if he had just Reason to pursue them, they cannot afterwards charge him as an *Improbus litigator*: Seing if he had deponed *de Calumnia*, that would have effectually excluded all that can be pled against him.

Replied for *Fullarton*, That tho' the Judges did sustain his Process and gave him a Decreet, yet one Wrong can never excuse another, specially considering the Chamberlain was *Origo mali*.

Duplied for the Chamberlain, That the Pursuer might as well say, That an exceptionable Decreet used for Poinding, could not defend against a Spuillie, because both were wrong. 2^{do}. Injustice may be also done to a Pursuer, and therefore he as such is not always *Origo mali*. The Commencement of this Action was agreeable to the Chamberlain's Trust and Duty, and what follow'd upon his Complaint was not of him.

Triplied for *Fullarton*, That his Character could not excuse him, otherwise a Factor would be privileged to oppress his Neighbours, if he can but thereby Enrich his Master.

Affor M^c Doual. }
Alter Nasmyth. }

The Lords Found no Damages due by the Justices of Peace; but found the Chamberlain liable in Damage, and restricted the 10 Lib. Stirling decerned by the Ordinary, to 5 Lib. Sterling.

Gibson, Clerk.

DECISION LXXXIV.

Eodem Die.

Robert Inglis Chirurgion in Queensferry,

AGAINST

Margaret Harvie, and Archibald Ogilvie Brewer her Husband.

*M*argaret Harvie having Accepted a Bill payable to Robert Inglis before the Marriage, which was not Protested; he now insists both against her and her Husband for Payment; and the Lord Ordinary having found the Husband Liable for the Sum in the Bill, it not bearing Annualrent, but ordaining the Pursuer to prove that the Husband was *Lucratus* by the Marriage, before he could be Liable therefore. The Pursuer Acquiesced in the first Part of the Interlocutor, as being Consequential to a late Decision 15th July 1713, *Watson contra Gordon*, where the Lords found, That a Bill did not bear Annualrent, in respect it was not Protested; and therefore contended, that this Bill, for that Reason, not bearing Annualrent, must affect the Husband, who *Jure Mariti* would have

have Right to all Bills due to his Wife, and not Protested, & *quem sequenter commoda*, &c. But as to the 2d Part of the Bill, the Pursuer Reclaimed upon the following Grounds:

1mo. That as the Husband hath Right *Jure Mariti* to moveable Debts due to the Wife, so he must be liable for all Debts of that Kind due by her; which, as being founded on Natural Equity, and the Analogy of Law, and as arising from the Communion of Moveables betwixt married Persons, is expressly maintained by Sir George Mackenzie, *Inst. P. 35.* and Viscount Stair, *Inst. 1. Tit. 4. P. 32.* 2do. The Husband being an incontrollable Administrator of the Goods in Communion, if he were not subject to the Diligence of Creditors, till after a tedious and uncertain Process of Compt and Reckoning, whether the Husband be *Lucratus* or not, the Moveables in the mean Time might be conveyed away or embezled, and Creditors disappointed of their Payments. 3tio. The Husband is always found liable, even for Heritable Debts *in quantum Lucratus*; therefore to make him liable for Moveables only in the same Manner, would take away all Distinction which Law and Practice hath made betwixt Heritables and Moveables.

Answered for the Defenders, As to a Bill's not bearing Annualrent when not Protested, That by the Acts 1681 and 1696, Bills bear Annualrent, in case of not Acceptance from their Date, and in case of Acceptance and not Payment from the Day of their falling due; and it was so decided 8th June 1705, *Blair contra Oliphant*: And therefore the Term of Payment being in the present Case past before the Marriage, the Bill is like a Bond bearing Annualrent; and if it were otherwise, it would be in the Power of the Possessor of a Bill to make a 3d Party liable or not as he thought fit. And as to the Decision *Watson contra Gordon*, *Answered*, That the Speciality of that Decision was, That the Executors of the Possessors of the Bill were pursuing, and the Debtor did not know to whom to pay, until they had made up a Title, and so he was not *in Mora*; therefore the Lords thought it not reasonable that he should be burdened with Annualrent.

As to the Grounds of the Petition, with respect to the Husband's being *Lucratus*, *Answered*, 1mo. That the Ordinary's Interlocutor is to be understood *in terminis habilibus*, viz. That if a Man should be found liable for the Sums in a Bill, it must be understood to be to the Extent of the Moveables that *Jure Mariti* he got by the Marriage. And this is certainly the Meaning of all our Lawiers, such as Stair, Mackenzie, &c. writing on that Subject; and is clear from *Dirleton*, P. 106. And as to the Distinction betwixt Heritables and Moveables, *Answered*, That the Defenders were not concerned to argue what Effect the Wife's heritable Debts may have against the Husband's Moveables, which is a Point that the Viscount Stairs owns to be dubious; but that it is enough for them to say, That the Husband ought to be but liable for the Wife's Debt, in as far as he has her Effects, whether Heritable or Moveable, which is confirmed by a 3d Decision, *Gordon contra Lady Gight*.

The Lords Found the Husband liable for a Moveable Debt, whether he be *Lucratus* or not by the Marriage;
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Astor Binning. }
Alter Rigg. }

But their Lordships Determined nothing as to the Bill in Question; only reserved to the Parties to be heard before the Ordinary, Whether the same be Heritable or Moveable.

Gibson, Clerk.

DECISION LXXXV.

[22d February 1715.]

William Bowls Sollicitor in Exchequer,

AGAINST

Sir John Johnston of Caskieben

SIR *John Johnston* being Cautioner to the Town of *Aberdeen* for one *Douglafs Baxter* there; and having a Bond of Relief in the ordinary Terms, upon *Douglafs's* Death *William Bowls* obtained a Gift of Bastardy; and Sir *John* insisted for Payment against the Donator, Libelling upon his Bond of Relief, and also for another Sum of 55 *Lib. Scots*, due to him by the Bastard. In this Process Sir *John* acknowledged upon Oath Payment of 36 *Lib. Scots*; and at the Advising his Oath gave in a Bill for Expences, which was refused, and so the Decreet went out, as to the Bond of Relief, in the Terms of the Libel, decerning the Donator either to Free, Relieve, &c. or make Payment of the said Sums, &c. after the Form and Tenor of the said Bond of Relief in all Points. In a Suspension of this Decreet, the Point in Question being, *Whether the Penalty of the first Bond by Douglafs to the Town of Aberdeen, is due to the Cautioner?* The Donator contended, It was not.

Because, 1mo. The Charger having insisted upon the Alternative of Payment, to which no Penalty is taxed in the great *Decernitor*, could not therefore now charge upon the first Member of the Alternatives to relieve him of the Bond and Penalty therein contained. 2do. That there was no Penalty adjected to the Bond of Relief, but only in that granted to the Town of *Aberdeen*; to which, altho' Sir *John* obtained Assignation upon Payment, yet the Town did not exact the full Penalty. 3tio. That the Donator is in the Case of an Executor, who must have a Decreet for his Warrant, and therefore liable in no Penalty nor Expences. 4to. No Penalty or Expences here, because of the *Plus petitio*, Sir *John* having received 36 *Lib.* as said is.

Answered for the Charger, That here there was only a Penalty craved, and the Lords do often refuse Expences where Persons have been Litigious, and yet sustain the Penalties in Bonds for reimbursing the Damages the Creditors may sustain on account of the Expences depursed. And the Decreet, tho' it assoillies from the 36 *Lib.* yet decerned for the rest of the Libel; now the Penalty was expressly Libelled on. 2do. That tho' there be no Penalty in the Bond of Relief, yet it obliges *Douglafs* to relieve Sir *John* of the Penalty contained in the first Bond, or pay it to him; and therefore he having failed in the First, it was just to Decern him in the Second. 3tio. Tho' the Donator must have a Decreet, yet that

that can never excuse his extraordinary Litigiousness. *4to.* That there was no *Plus Petitio*; for at Commencement of Sir John's Process the full 55 *Lib.* was due: But it having depended long, Sir John in the *Interim* recovered 36 *Lib.* by a Furthcoming, and fairly in his Oath acknowledged and allow'd the same.

Ador Graham. }
Alter Horn.

The Lords restricted the Penalty of the Bond granted to the Treasurer of Aberdeen; wherein the Charger was bound with Douglass the Bastard, to the Sums paid by the Charger to the Creditor.

Sir James Justice, Clerk.

DECISION LXXXVI.

Eodem Die.

Thomas Spence Writer in *Edinburgh,*

AGAINST

Sir Adam Whiteford of *Blairquhan.*

SIR *Adam* being Superior of some Part of the Estate of *Dalvennan* raised Reduction and Improbation against *Shaw* of *Keirs*, from whom the saids Lands had been purchased by *John Binning*; in which Summons he also calls the said *John*, as he who had been in Possession of the saids Lands, wherein he calls for Production of all their Predecessors Writs, &c. and at length in *February* 1707, obtains a Decreet of Certification. But *Thomas Spence* having, after Citation in this Process, but before pronouncing Decreet, led an Adjudication, he now charges Sir *Adam* the Superior to receive him; which Charge being suspended upon this Reason, That *John Binning's* Right being improved by the Certification, Sir *Adam* was not obliged to enter the Charger as an Adjudger from him. And *Thomas Spence* having Answered, That his Adjudication being before the Decreet of Certification, and *Binning* thereby Denuded, he the Adjudger ought to have been called in the Improbation; which not being done, it was Null as to him. So that the Question turning upon this, *viz.* Whether the Superior, when insisting in this Process, be bound to take Notice of an Adjudger, whose Adjudication was led prior to pronouncing Decreet, by After-Citation?

It was *Alledged* for the Superior, That whatever may be said of Third Parties Infeft and Holding of the Vassal that they ought to be called, yet that was never extended to the Vassals Creditors Adjudging, who have done no Diligence to obtain themselves Infeft Holding of the Superior: For this were a great Hardship upon Superiors, since Adjudgers may possess within the Legal, without taking Notice of the Superior. And tho' a Superior by positive Statute (contrary to common Rules) be bound to receive an Adjudger, yet he cannot be obliged to take Notice of him,

but when he charges him to Infeft; which if done out of Time after the Superiors Decreet of Certification, 'tis his own Fault in not doing timely Diligence, but this cannot prevent the Effect of the Certification. 2do. Albeit the Calling an Adjudger were necessary, yet it was impossible in this Case, where the Improbation was depending before the Adjudication was led, yea before Summons raised.

Answered for the Adjudger; That a Superior cannot pretend that a publick Diligence, such as an Adjudication, which within a short Time after pronouncing, is by our Law put into the publick Records, is such a Right as he is not bound to notice. Besides, That an Adjudger differs in this Point from a Creditor, by an heritable Bond and an Infeftment, holding of the Vassal; for that is only a subaltern Right, and may be latent, but the very Property of the Subject is vested in an Adjudger absolutely, if not redeemed within the Legal, whereby he is immediatly intitled to an Action against the Superior to receive him. So that an Adjudication is not only a publick Right, but such an one as Denudes the former Vassal. 2do. A Decreet of Certification is not of the Nature of Declarators upon *feudal Delinquences*, whereby the Vassals Right is made *retro* void; for it can never be understood to have any further Effect than from the Date of the Certification: So that any inchoate Diligence, much less a compleated one, such as this is, can never be prejudged thereby.

*After Sir Ja: Stewart.
art. Alter Sir Jo:
Ferguson.*

The Lords Found, That the Superior was only bound, in an Action of Reduction and Improbation, to call his Vassal or his Representatives, and those in Possession; But was not obliged to call an Adjudger of the Vassals or Sub-vassals, whose Adjudication was after the Date of the Citation in the Improbation.
Robertson, Clerk.

DECISION LXXXVII.

Eodem Die.

Elisabeth Gelly and others,
AGAINST

The other Creditors of *Monimusk* and their Factor.

Elisabeth Gellie and others, Creditors of *Monimusk*, having arrested on their personal Obligements, in the Tenents Hands, *Alexander Peirie* *Monimusk's* Chamberlain, does nevertheless take up the arrested Money out of their Hands; and the other Creditors having thereafter got the Estate sequestered in the Hands of *James Man* as Factor by the Lords, with Power to him to uplift Rents, &c. And call *Pierie* to an account: And going on also in Adjudications, &c. The Arresters raise a Forthcoming, both against the Tenents, and also call *Pierie* as he who uplifted the Rents affected by them. *Man* also the Creditors Factor insists against *Pierie* and their Tenents for the bygone Rents, and the Sums uplifted by *Pierie* from them. This having occasioned a Competition, the Point in Question was, Whether these Arresters have a Right of Preference to these

these Rents, and to Repete the same from *Pierie*, tho' no Arrestment was used against him? Or if *Man* the other Creditors Factor have a preferable Title to the Ballance in *Pierie's* Hands, arising from his Intromissions with the Rents arrested?

It was *Alledged* for *Man*, That by his Commission from the Lords, he was impowered to uplift; Not only the Rents from the Tenents, but likewise to call *Pierie* the common Debtors Chamberlain to account for his Intromissions: And that the saids Arresters had not affected the Ballance in *Pierie's* Hands; and therefore could not in an Action of Furthcoming obtain Decreet against *Pierie*.

Answered for the Arresters, That the said Ballance belonged to them, because it proceeded from *Pierie's* Intromissions with the Rents which they had arrested in the Tenents Hands: And his Intromission being as Chamberlain to the common Debtor, was obnoxious to their Action of Forthcoming in the same way with the Tenents; since the Arrestment was a *nexus realis*, affording an Action of Repetition against any Intrometter; nor could a voluntary Payment dissolve it. So that these Rents could be only uplifted by *Pierie cum suo onere*, and consequently he liable here, tho' no new Diligence was used against him.

Replied for the other Creditors, That they had raised Summons of Adjudication before the Arrestments were used: Now Adjudications give Right to the Mails and Duties before Arrestments.

Duplyed for the Arresters, That they were only seeking Preference to bygone Rests, and Rents of the Term current, before any Adjudication was compleat; for till then no Adjudger could compete with an Arrest-er, for Mails and Duties; as was found 2d July 1667, *Lister contra Aiton and Keith*; far less is a naked Summons of Adjudication to be noticed; for whatever that may operate against voluntar Deeds of the Debtor, yet it has no Effect against a lawful Creditor using Arrestment.

The Lords found, That *Pierie the Chamberlain*, having Intromitted with what was Arrested in the Tenents Hands, he was liable to the Arresters for the same; And therefore preferred the Arresters to *Man* the subsequent Factor, as to the Ballance in *Pierie's* Hands, in so far as their Arrestments gave them Interest therein, or extended to.

Roberton, Clerk.

Actor Hay. Alter }
Horn.

DECISION LXXXVIII.

Eodem Die.

Brigadeer Preston,

AGAINST

Colonel John Erskine.

THE Brigadeer having purchased the Lands of *Valeyfeild, Overtoun, Pitfouilly*, and others, as highest Offerrer at the Roup, and given Bond for the Price, presents a Bill Craving his Bond may be given up to him, because he had paid the Price to the Creditors conform to the

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Decreet

Decreet of Ranking. And having also given a Scheme of the Price and Debts, *Colonel Erskine* a Creditor gives in this Objection against the same, viz. That the *Brigadeer* by the Scheme laid the whole preferable Debts, so as to exhaust the Price of *Valeyfeild*, without taking any Part of them out of the Price of *Overtoun* and others, upon which these Debts are also preferably Ranked; and this to the Colonel's Prejudice, who is Ranked upon *Valeyfeild*, after these preferable Creditors, but is not Ranked upon *Overtoun*, &c.

Answered for the *Brigadeer*, That he may use his Securities in the most profitable Way for himself: Nor does thereby any thing in emulation of the *Colonel*, but only uses his Right in a warrantable Way, and may draw his full Payment out of *Valeyfeild*, without any Regard to the *Colonel's* Debt: Specially since otherwise the *Brigadeer* would be cut off from the Payment of these Debts affecting the separate Estate, which is untouched by the *Colonel's* Diligence. Whereby it appears, That the *Brigadeer* is not taking this Method, *in emulationem*; nor can any Creditor give Rules to another, how he is to use his Diligence, since thereof he is *Liber Moderator & Arbitrator*.

Replied for the *Colonel*, That as these preferable Debts were a general Burden affecting the whole Estate, so they affected not one Part more than another, and therefore the different Parts were according to their Value to confer their Proportions for discharging this common Burden; and altho' the Creditor might distress any one Part for the whole, yet that did not alter the natural Tye on the respective Parts for conferring their Shares to their joint mutual Relief. And in such Cases very often our Law and the Lords Practice, order Assignations, after the Example of the *Roman beneficium cedendarum Actionum*.

Duplied for the *Brigadeer*, That no such Assignation was ever ordained to be granted, where there was an evident Prejudice thereby to the prior Creditor, to the exclusion of his other Rights. As was decided in the Ranking of the Creditor of the same Estate of *Valeyfeild*, betwixt these same Parties contending.

Hay for Preston.
Alter Sir Walter
Pringle. }

The Lords found, That the *Brigadeer* may affect the Lands of *Valeyfeild*, with the Debts which are preferable on the whole Subject exposed to Roup, to the Effect he may get Payment of his other Debts, affecting particular Subjects, which he may use to his own best Advantage, without Emulation to *Colonel Erskine*.
Gibson, Clerk.

DECISION LXXXIX.

Eodem Lije.

Sir John Clark of Penny-cook,
AGAINST

Captain William Preston and others.

TH E R E being a Competition betwixt Captain *Preston* &c. and Sir John, concerning the Patronage of the Paroch of *Lastwade*, by reason of an incident Question about the Disposure of the vacant Stipend, and

and the *Prestons* having founded on an Inhibition at their Instance, prior to the Disposition of the Patronage, by *John Preston* to Sir *John Nicolson*, Sir *John Clark*'s immediate Author; Sir *John* made Two Objections against the Execution of the Inhibition at the Market Cross of *Edinburgh*, Peer and Shore of *Leith*, the Party being out of the Kingdom, viz. 1mo. That the Execution did not bear Three Oyeses, and publick Reading thereof. 2do. That the said Execution was not signed or marked by the Clerk-register of Inhibitions, in the Terms of the 119 Act 7th Parl: *James 6th*.

Answered for the Inhibitors, to the First Objection, That the Citation of the Party at the Market Cross, Peer and Shore, &c. is in place of the personal Citation at the Dwelling House, when the Party is within the Kingdom; and that in neither of these Cases the Three Oyeses are required, and that the affixing of the Copy at the said respective Places is sufficient to certiorat the Leidges, that the Party Inhibited might be acquainted by and through them: Since the Inhibition concerns the Leidges more than the Party himself, if they be duely Certiorate, and the Formalities observed in the Citations to them. 2do. That there was a Decision 15th February 1681. *Gordon contra Forbes*, remarked by my Lord *Stair*, and an Act of Sederunt, made upon that Occasion, declaring that in all such Executions thereafter, it should particularly be exprest; that Three Oyeses were given, &c. otherwise the Lords would not sustain the Execution and the Execution now quarrelled being in 1675 before that Act, ought to be sustained, the Act having no retrospect.

Replied for Sir *John*, 1mo. That Law requiring Forms of Execution against those out of the Country, quite different from those at the Dwelling House or Personally Apprehended, the Argument cannot hold that because Three Oyeses are not necessary to a personal Citation or at the Dwelling House, therefore they are not necessary to a Citation out of the Country: Nor is the bare affixing without the Oyeses any better in this Case, then the affixing at the Dwelling House without the six Knocks, &c. And it's *gratis dictum*, that the affixing is sufficient for certiorating the Leidges, for many may hear the Citation when openly proclaimed, who cannot read the Copy nor have Access to see it, it being commonly soon Torn off: Nay, the Inhibition indeed concerns the Party more than the Leidges, since it ties up his Hands, and breaks his Credit; and when he is duely certiorate, he can stop Registration by purging the Debt. And as to the Decision and Act of Sederunt 1681, 1mo. The Case of that Citation was upon a Summons, which indeed is not so nice, as that upon an Inhibition. 2do. The Lords did not sustain the Execution without the Oyeses. 3tio. The Act does plainly declare what had been Law, but that the same had been neglected by an evil Custom. 4to. The Question only there was, whether the Words (*after lawful Publication*) were sufficient, or if the Oyeses ought also to be added: But here the Execution against the Party, does not bear (*after lawful Publication*) nor the Three Oyeses, nor (*after reading of the Letters.*)

After Gray. Alter
Sir Wal: Pringle.

The Lords sustained the Nullity of the Inhibition, viz. That the Execution thereof at the Peer and Shore of Leith, did not bear Three Oyeses, or publick Reading thereof.

Alexander, Clerk.

D E C I S I O N X C.

Eodem Die, Inter Eosdem.

AS to the *Second* Objection or Nullity, *Answered* for the Inhibitors, *1mo.* That the Execution at the Market Cross is marked. *2do.* That the Execution is recorded with the Letters, which makes the Publication, and that the signing by the Clerk was not designed for the Security of the Leidges, but for the Use of the Ingiver, that he might know when and where the Executions were Registrate: For at this Rate Contractors might be put to go to the User of the Inhibition, to see whether the Execution were marked or not, and oblige him to exhibit them, on Pretence, that if they be not Marked, he may lawfully contract. And that the Case was like a Messenger delivering a Copy not bearing the Witnesses Names to the Execution; for tho' he may be Punished on that account; yet the Execution will not be Null.

Replied for Sir John to the *First*, That this makes against the Inhibitors, Since it proves what was Custom as well as Law. To the *Second Replied, 1mo.* That the Words of the Act are express, and an Irritancy adjected. *2do.* That the marking the Execution does rather concern the Leidges than the Ingiver, and was calculate, that it might not be in the Power of Parties to change Executions after they were Registrate: Or in case one of them were lost, to make it up. And it's likewise a Check upon the Clerk, that he may not Registrate a Copy instead of a Principal; For otherwise he might Registrate a Copy before the Inhibition were execute, and then the Execution might be made up, *ex post facto*. And as to Contractors obliging the Inhibitor to Produce, &c. *Replied*, That by the same Reasoning, a forg'd Execution should be good if Registrate, because otherwise (according to this Argument) a Party might oblige Inhibitors to produce the Executions to see if they were forged or not: Nor is there any Parrallel betwixt this and the Messenger's not insert Witnesses, &c. for if such a Copy were given, the Party would not be obliged to Answer,

Astor Gray: Alter }
Sir Walter Pringle. }

The Lords sustained the Nullity of the Inhibition, viz. That the Execution at the Market Cross of Edinburgh, was not marked and signed by the Clerk, in the Terms of the 119 Act 7th Parliament James Sixth.
Alexander, Clerk.

D E C I S I O N X C I.

*Eodem Die.**Andrew Majoribanks of that Ilk,*

A G A I N S T

Nisbet of Dirletoun.

MAJORIBANKS as having Right by Progress from *Woodcockdale* to 3000 Merks, contained in a Bond granted to him by Sir John Nisbet of *Dirletoun* in anno 1676, and 604 Merks contained in a Decreet of Furthcoming

coming in *Anno* 1685, insists against the now *Dirletoun*, on the Passive Titles for Payment.

Alledged for the Defender, That he could not be Liable for the Principal Sums, but in the Terms of the Lord *Dirletoun*'s Bond, whereof the Term of Payment is not yet come, the Principal Sums being only payable at the first Term of *Candlemass* or *Lambmass*, after the Lands of *Fentonbarns* and others disposed by *William Couper* to him, should be Purged, Disburdened, Freed and Relieved of the Infestment of Annualrent of 500 Merks Yearly, disposed out of the same to *David M'culloch* of *Good-trees*.

Answered for the Pursuer, That the Incumbrance is sufficiently Purged, in so far as the Infestment being granted in *Anno* 1623, the same is now long Prescribed. 2do. *Dirletoun* hath been now near 40 Years in Possession of the Lands, since his Author Purchased the same; So that he is Secured by the positive Prescription, he and his Author having Possess without Interruption or Distress.

Replied for the Defender, That the Prescription is not *Dirletoun*'s concern to Debate, that being the Business of *M'culloch*'s Heirs, who cannot be Concluded by any Debate betwixt *Marjoribanks* and *Dirletoun*: And if this Pretence had been enough, Sir *John Nisbet* needed not have detained a Sum in his Hands, effecting to the Infestment of Annualrent, it being Prescribed even at the Time of granting the Bond.

Duplyed for the Pursuer, That the Prescription was not *jus Tertii* to *Dirletoun*; for he having founded his Defence on *M'culloch*'s Right, whatever was Competent to remove him, was also Competent against the Defender. Nor was there any need to raise a Declarator of Extinction against *M'culloch*'s Heirs, because Prescription had as effectually Extinguished the Annualrent, as if it had been actually Renounced.

The Lords found the Defender ought to pay the Sums Libelled, the Pursuer giving a Discharge with absolute Warrantice; And finding Caution to Relieve the Defender of the Infestment of Annualrent: Which Caution is to Subsist for Ten Years (in Case there be no Distress within that Time) from the Date of Payment.

Sir James Justice, Clerk.

DECISION XCII.

[7th June 1715.]

Alexander Tweedie,

AGAINST

John Din and others.

Alexander Tweedie having Sold a Stock of Sheep to *John Din*, for which he got his Bond; He Registrate him at the Horn, and a few Months thereafter, endeavouring to Poind, he found the Sheep disposed

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Astor Massie, }
Alter Bennet. }

posed upon to some Neighbours; and having Arrested in their Hands, and pursuing a Forthcoming, they Deponed, *They had got the Goods, but that they had Bought them, for Payment of Debts due to them by the Common Debtor, or wherein they were Cautioners for him:* But for these their Debts, no Diligence save Registrations of their Bonds was used, and the common Debtor still continued to Trade in Buying and Selling Sheep, &c.

Tweddie now insisting upon the latter Clause of the Act of Parliament 1621, and Alledging, That he was in the precise Words thereof; Because he had used Diligence to affect his Debtor's Goods, by a Registrate Horning against a Bankrupt and Divor; And that the other Creditors had obtained Payment (by the partial Favour of the Debtor) tho' Posterior to him in Diligence; and therefore he had good Action to Recover what was thus Voluntarily paid.

And the Co-Creditors Defenders, having *Alledged*, 1^{mo}. That there was a difference betwixt *Bankrupt* and *Insolvent*, and that the Law was only to be understood of the First; and here the common Debtor was not Bankrupt. 2^{do}. Betwixt Creditors Partakers of the Fraud, and those who are not. 3^{tio}. Betwixt those who had got Payment, and such who only were compeating for Preference, on a Subject yet outstanding.

Answered for the Pursuer, 1^{mo}. That there is a difference betwixt Bankrupt by the Act 1696, so to Operate the Effect of that Law, and Bankrupt by the Act 1621, to afford the Benefit of that Act: That less is requisite to make one Bankrupt by the latter than the former; because the Effect of the Act 1621, is nothing so general as of the Act 1696. So that with respect to the Benefite of the Act 1621, it was sufficient that a Horning was Registrate against the common Debtor. And this was so found 11th December 1691, the Creditors of *Langtoun* Compeating, observed by the Lord *Stair*, *Inst. Tit. Reparation*, §. 15. For there, *tho' single Insolvency was not sustained, yet joined with legal Diligences, beginning to be Railed and Execnte, was found sufficient.* As to the second Point, *Answered*, That it makes no difference as to this Clause of the Act, whether the Receiver was *particeps fraudis*, or not; For the former Clause of the Act does indeed make that Distinction and Repeats it twice: But the latter Clause hath no such Quality burdening the prejudged Creditor with proving the Participation; but all that therein is required, is a prior Diligence, and a partial Preference; so that the Clause being here omitted, it is *de Industria* done; and therefore the Addition of it, is against the Mind of the Law. As to the Third, *Answered*, that there is no such Distinction to be made, as is plain from the Law, for the Preference and Repetition are joined in one Clause, without any difference made; and therefore as the Co-Creditor would be preferred, so also has he Action for Repetition; as was found 12th February 1715, *Veatch contra Keir*.

Replied for the Defenders, That the Import of the Act 1621, is very plain, especially if Traced up to the *common Law*, from whence (as appears by the express Words of the Act) it is derived, where there is a manifest Distinction made betwixt *lucrative* Deeds in Prejudice of Creditors, and *Onerous*: In the first, *non est querendum an sciente eo cui donatum, gestum,*

gestum sit, sed hoc tantum an fraudentur Creditores. L. 6. § 11. ff. *que in fraud. Cred.* But where the Right is Onerous, such as where a true Creditor receives his Payment, *non sufficit si simpliciter sciat illum Creditores habere, sed si particeps fraudis sit.* L. 10. §. 2. C. *eod.* And consequentially our Act of Parliament is divided in Two Branches, the one with respect to *Lucrative Conveyances*, such as the Law presumes all these in favours of Conjunct and Confident Persons; and such again as are *Onerous*, and there the Act Denotes the Person, whose Deeds are to be Reduced by the the Name of *Divour* or *Interposed Persons* Partakers of the Fraud, which necessarily implies, that there ought such Circumstances of *Bankruptcy* to appear, as might interpel the Party who is Onerously Contracting, from dealing with the *Divour*. As to the Decision in the Case of *Langtoun's* Creditors, 1mo. The Rights there Reduced were Rights in Security granted after Diligence. 2do. There was such a Croud of Diligence against the Common Debtor, that it amounted to a *Notoriety* of his bad Circumstances. 3tio. These Diligences were so far Prosecute, that *ex continenti*, the common Debtor retired to the *Abbey*: All which make that Case widely differ from the present. And the Decision *Veatch* contra *Keir*. proceeds exactly upon the same Principle. All which is distinctly cleared by a late Decision 7th July 1709. *Lady Renton* contra *Thomas Gibson*; the Words of the Interlocutor are, *The Lords found, That in Case of a Master's obtaining a Disposition from his Tenant, tho' in a Competition another Creditor doing Diligence might be preferred, yet the Master having obtained Payment bona fide by Vertue of the Disposition, is not Liable to Repeat what he received.* As to the Act 1696, it is obvious from the Tract of our Decisions, that before that Act, the difference betwixt a Debtor *Insolvent* (but still keeping his Trade and Credit) and a *Bankrupt* Debtor, was well Established; and that Act did not so much introduce the Qualifications making Notour Bankrupt, as the Priviledge of reducing Deeds done 60 Days before the Period of Bankrupt. Lastly if it were otherways, there would be a Door opened to unspeakable Confusion, and a stop put to all Commerce, since thus no Man could be sure of what he may call justly his own.

The Lords found Insolvency of the common Debtor, with Horning and Denunciation against him, not Relevant per se, to give the Pursuer the Benefite of the last Clause of the Act of Parliament 1621, anent Bankrupts, without Participation of the Fraud, by the Creditors receiving Payment by Goods from the common Debtor.

Sir James Justice, Clerk.

DECISION XCIII.

[8th June 1715.]

Isobel Anderson,

AGAINST

Corbet of Hardgray.

Hardgray having become Cautioner for Captain *Anderson* in his Father's Testament as Executor; He for *Hardgray's* Relief, disposes to him among other Things, the Lands of *Partick*, but took his Back-

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bond

Actor *Boswel.* }
Alter *Graham.* }

bond in *Anno* 1692, Declaring, That the Disposition was granted to the Effect, that *Hardgray* might Sell the Lands, and apply the Price for his own Relief, and Payment of other Creditors, and the Ballance to the Captain's Wife, Children, &c. The Captain thereafter with Consent of *Hardgray*, Sells the Lands to Provost *Gibson*, and *Hardgray* became Cautioner in the Warrantice of the Disposition, which with *Gibson's* Bond for the Price, was Depositate in a Third Person's Hands, upon these Terms, not to be delivered up till *Hardgray* was relieved of all his former Engagements for the Captain, from thence till 1702, *Hardgray* did not Intromet with the Rents of the Lands, but suffered them to remain in the Tennants Hands: But *Isabel Anderson* the Captain's Heir having thereafter insisted in a Compt and Reckoning against him upon his foresaid Backbond, Charges him among other Things with the said Ten Years Rent of the Lands of *Partick*, for which he contended he was not Liable. Because,

1mo. Since the Captain's Disposition was only a further Security, by the Nature of the Thing he ought not be Liable for Diligence, except in so far as he had debarred the Disposer or any of his Creditors from Possession, which he had not done. 2do. Tho' by the Back-bond, he was obliged to do Diligence, yet that Obligation must only be to do Diligence for the Purposes mentioned in the Back-bond, which was not to uplift the Rents, but to do what he could to Sell the Lands, and dispose on the Price, &c. And that this was solely the Party's View, appears, in that very soon thereafter there was a Bargain made with Provost *Gibson* for them, tho' that Sale proved ineffectual by the Captain's own Fault in not relieving *Hardgray*.

Answered for the Pursuer, 1mo. That by the Backbond *Hardgray* Declares, That the Right was granted, that he might Sell and Dispose upon the Lands, uplift Sums, &c. and do Diligence for effectuating Payment. So that the Debts due to himself and other Creditors might be satisfied; So that having bound himself to do Diligence, he must be Liable for these Ten Years Rent, unless he could say, that after ultimate Diligence he was debarred. 2do. He being by the Back-bond bound to Sell these Lands to the best Advantage for Payment of Debts, and pay in the Surplus to the Disposer, he can never be in *bona fide* to allow Ten Years Rent to Perish. 3tio. As to the Selling to Provost *Gibson*, and Depositing the Disposition. *Answered*, That *Hardgray* having been Trustee for the Captain, in his whole Estate, for Securing of Creditors, &c. *perinde est*, whether *Hardgray* granted the Disposition, or the Captain, with his Consent? for still *Hardgray* in whose Person the Right stood, must be Reput the Disposer, since the Captain had no Right either to the Lands or Price, except in the Terms of *Hardgray's* Backbond, so that the Sale was still *Hardgray's* Deed, and not the Captain's. Besides, That so long as the Papers were Deposited, they were in Effect as not granted, nor could give any Right to Provost *Gibson*, either to Possess or Intromet with the Rents, and therefore could not debar *Hardgray* from either; so that he must still be Liable for the Rents; this method being far from performing the Obligation that lay upon him by his Backbond, *viz.* to do all possible Diligence to Sell the Lands for Payment of Debts, &c.

Replied

Replied for the Defender, That a deposited Disposition, and no Disposition greatly differ, at least as to the Pursuer; for where Mutual Writs are Deposited, not to be recalled at the Option of the Granters, but put in a Third Party's Hand, till certain Articles be performed, they are *quodammodo* delivered, and the *Depositar* is considered as a common *Sequestrator* for them both: And upon Performance of the Terms of Deposition, the Writs are as if *Retro* delivered of the Date; and thus during the Deposition, the Subjects are understood Sequestrate: And here, had the Captain Implemented the Terms of the Deposition, the Rents would have *Retro* belonged to the Provost, and the Annualrents of the Price to the Captain. Nay the present particular Case is much stronger, for the Defender having Consented to a Sale of the Lands, and the Terms of Deposition being Prestable by the Captain himself, he cannot be admitted to plead his own Fault, to Subject the Defender to Diligence; for if he had relieved the Defender, the Price had come for clearing the Defender's Engagements, and the Disposition would have been effectually delivered, nor was there any Obligation upon the Defender after the Subject was Disposed by the Captain's own Consent, to do further Diligence thereanent.

Actor Elphinstone.
Alter Sir John Fergusson.

The Lords found Hardgray not Liable for the Rents, unless it were Instructed, that he had entered to the Possession.

Sir James Justice, Clerk,

DECISION XCIV.

[11th June 1715.]

John Farquhar,

AGAINST

Mr. James and Alexander Hunters.

THE Deceast *Alexander Hunter* in *Layhead*, by Contract of Marriage with *Margaret Farquhar* his Spouse, having Provided her to the Half of the free Goods and Gear that should Pertain to him at his Death, (in Case of no Childeren) and he having both Heritable Bonds and other Sums bearing Annualrent; and particularly there being a Debt Heritably Secured upon the Estate of *Auchinhove*, he disposed the same to *Mr. James and Alexander Hunters*. but reserved a Power to himself to alter; And *Sir Robert Forbes* having Purchased the Lands of *Anchin-hove*, and thereafter made over his Rights to *Mr. James Fergusson*, the Creditor Transacted the Debt, and received a simple Bond from *Mr. James Fergusson*, which Bond he thus Indorsed on the Back with his own Hand, *I desire you may Transact the Inclosed Bond to the Bearer. Mr. James Hunter, in his own Name; for he has given me his Receipt and Obligation to Pay me the Annualrent and the Principal when I seek it, after ye have paid him, &c.* And at the same Time delivered the Bond to *Mr. James Hunter*. The Question then being, Whether, by the Concep-

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tion of the Contract of Marriage, mentioning only *Goods and Gear*, the Wife was excluded from any Share of *Debts and Sums of Money*? As also, Whether the new Bond by Mr. *Ferguson*, tho' coming in Place of a Heritable Subject, did become Moveable, and so fall under the Communion? It was *Alledged* for the Relict and *John Farquhar* her Assigney the Pursuer,

1mo. That tho' the said Bond came in place of an Heritable Subject, yet the Husband having by Acceptation thereof, declared his Intention, that it should be Moveable, and fall under the Communion, he could not thereafter alter his Intention to the Prejudice of the Relict, and Evacuate the said Clause of the Contract of Marriage. 2do. That the Transmissi- on was not Habile, as being by way of Indorsation, which altho' allowed in Bills of Exchange, yet that is not the Stile or Method of Transmis- sion of Bonds. 3tio. That the Indorsation as it stood was Null, wanting Writer's Name and Witnesses.

Answered for *Hunters* the Defenders, 1mo. That as the Relict could have no Claim to the Debt, while it stood Heritably Secured; so it is certain, That if the Husband the Time of the said Transaction, would have taken the said Bond in either of the Defenders Names, all the Pursuer's Pretensions would likewise have been cut off: Now the Method taken was Equivalent to this, for the Momentaneous taking the Bond in the Husband's Name could never alter the Case, and give a Right to the Wife, so as he could not Dispose thereafter on the same, more than if he had had a Land Estate, Sold the same, and Employed the same an Hour thereafter, towards making a New Purchase, or given the same in *Specie* to a Friend. And altho' a Husband cannot Exclude his Wife from a Share of the Movables Provided by Contract of Marriage, by any *Gratuitous Deed*, yet this was never extended to Bonds granted in *Leige Poussie* without Fraud, as is observed by the Lord *Stair*, *Inst. Lib. 1. Tit. 4 § 15.* which is Parallel to the present Case, and was so decided 8th *December* 1675, *Thomsons, contra* the Creditors of *Thin*; And that the Transmission was Legal, doth appear from the above Mandate on the Back of the Bond, and the Obligement granted by *Alexander Hunter* to pay the Annualrent; And tho' there was a Faculty reserved to alter at Pleasure, yet the Defunct not having Exerted the same, and continuing the Bond in *Hunter's* Possession, makes his Intention Clear. And asto the want of Witnesses, *Answered*, That the Indorsation was Holograph.

Replied for the Pursuer, 1mo. That upon Transacting with Mr. *Ferguson*, the Debt became Moveable, and therefore tho' the Indorsation were Good, yet not being for an Onerous Cause, it cannot Exclude the Relict from her Share. 2do. This will hold, even tho' the new Bond had been taken in the Defenders Names, since even that could not be done (except for an Onerous Cause) in prejudice of the Wife, who is a Creditor by the Contract: So that the Comparison of Selling Land and making a new Purchase, cannot hold here; Because in that Case the Purchase being Heritage, could never fall under the Division: But in the present Case, notwithstanding of the Indorsation, the Sum is still Moveable. 3tio. As to the Passage in Lord *Stair's Institutes*, and the Decision Quoted, *Answered*, That they Speak only of disposing on Movables in

Leige

Leige Poultie without Fraud, when the Wife is not Provided by Contract, but is Claiming her *jus Relictæ*, which never hinders the Husband from Disposing on Moveables in his Lifetime, when he does it not Palpably to the Defrauding his Wife: But when (as in the present Case) the Wife is Provided by Contract, she becomes thereby Creditor, and therefore Alienations in her Prejudice, without an Onerous Cause, cannot subsist.

Astor John Forbes }
Alter Horn. }

The Lords found, That the new Bond being Moveable, and granted to the Defunct in his own Lifetime, and not Habilly Transmitted to the Defenders for an Onerous Cause, falls under the Division, conform to the Clause in the Contract of Marriage; And that the Relict's Assigney has Right to the Half of the Sums contained in the said Bond.

Sir James Justice, Clerk.

DECISION XCV.

[14th June 1715.]

Roderick Chisholm of Comer,

AGAINST

Mr. David Fenton, Inn-keeper in Dunkeld.

THE Laird of Comer arriving at the said Mr. David Fenton's House about Mid day, with Design only to Bait his Horses for an Hour and a Half or thereby; Mr. Fenton's Hostler did accordingly help to lead in the Horses to the Stable, upon one whereof there was a Bag or Valise, whole and intire, wherein was 1000 Merks; but a little thereafter, when the Horses were drawn out again, the said Bag was found flitted or cutted, and the Money away. Whereupon Comer having pursued the Master of the Inn, upon the Roman Edict, *Nautæ caupones*, &c.

It was Answered for the Defender, That there was no *Receptum* in this Case, as *Receptum* is taken in the Edict, because the Money or Valise was not received by the Defender, or any Servant of his, whose Trust that was; but put in on the Horse in a common Stable, which he contended was not *Receptum*: And when Money or precious Goods are brought into an Inn, they do no otherwise oblige the Inn-keeper to Restitution, *nisi specialiter sint assignata*, either to the Inn-keeper or his proper Servant, whose Trust that is. And that because, 1mo. It were against Natural Equity, that an Inn-keeper should be liable (for Example) for a precious Diamond, only because it was put into a common Stable, or contained in a small Leather Bag. 2do. Here the Pursuers own *Culpa precessit*, as not having done what Men of common Prudence would do, who doubtless would bring their Mails or Bags containing Money, &c. into the Lodging-house it self; so that the Omission of this was *Culpa Viatoris*.

Viatoris. Nor is it any great Inconveniency to do so, since it was but a small Bag; and tho' it had some Inconveniency, yet that will never overpoise the solid and unavoidable Hazard on the other Hand. 3^{to}. This is confirmed by *L. 7. ff. h. t.* where it is said, *Item, Si prædixerit ut unusquisque vectorum res suas servet, neque Damnum se præstiturum, & consenserint vectores prædictioni, non convenitur caupo seu Stabularius:* Where the Inn-keeper is allow'd *Prædicere Viatoribus, &c.* But how shall he make this Intimation, if Goods of the greatest Value may be thus huddled into a common Stable? So that the Law, which allows the Inn-keeper this Faculty *prædicere ut res suas servent*, does undoubtedly imply, that they must be *Assignata*: For how can a Man make an Intimation, concerning a Thing whereof he knows nothing. 4^{to}. This is further confirmed by the Authority of *Bruneman*, upon § 5. *L. 1. ff. h. t.* where Commenting upon these Words of the Law, *Ceterum si opera mediastini fungitur, non tenetur*, he says, *Si quis vilibus mancipiis aliquid committit custodiendum non obligatur exercitor cauponæ, nam isti servi viles non sunt ideo accepti, ut res custodiant; sed ut purgent atria, & labores sordidos expediant.* To which also agree *Mornacius* and *Mansuerius*.

Replied for the Pursuer, As to the Valise not being assigned, it contradicts the *L. 1. § 6. ff. h. t.* which binds the Inn-keeper, *Sive assignata, an & si non sint assignata; hoc tamen ipso, quod in Navem missæ sunt, receptæ videntur.* The Reason is obvious, and delivered by *Ant. Faber*, *Quia si bonus est exercitor vel caupo, ignorare non debet quid & a quo illatum sit.* And if he does not know, Law will not indulge his Negligence. As to the first Inforcement from Equity, Replied, That this Edict was introduced for publick Advantage, to which any Man's, or Set of Men's private Interest must give Place. To the Second, Replied, That the Pursuer did what most Travellers use to do, having alighted at the Defender's House, not at Night, but Mid-day; not to rest for any Time, but only to give his Horses Corn; he delivered his Horse, with the Valise on him, to the Defender's Servant, whose Office was to take care of the Stable, and who bound his Master *ut præstet receptum*: And no Man who cares for his Horse will take off a Valise while his Horse is hot after Travel. To the Third, Replied, That this is already Answered, from *L. 1. § 6. ff. h. t.* which requires no express Intimation to the Inn-keeper, but obliges him, as a diligent and careful Man ought, to know what is brought into his House; and it were of fatal Consequence very often, if Persons were obliged to use an Intimation to the Inn-keeper. But in the present Case, the Valise was in Effect delivered to the Servant, he having led in the Horse to the Stable. To the Fourth, Replied, That the Citation from *Bruneman* does not hit the Case; for the Servant here was not a *Servus vilis*, such as the *Mediastini*, but was *Hostler*, and consequently *Custodiæ causa præpositus*, whose Deed obliges the Master, *D. L. 1. § 3. ff. h. t.*

It was further urged for the Defender, That the Word *Receptum*, in the Sense of the Edict, did not extend to this Case; for the Law says, *Ait prætor, nauta, caupones quod cujusque saluum fore receperint; hoc est, quamcunque rem sive mercem receperint, inde apud vivianum relatum est; ad eas quoque res hoc Edictum pertinere quæ mercedibus accederint, veluti vestimenta quibus in Navibus uterentur, &c. quæ ad quotidianum usum habemus.*

habemus. Which is confirmed by the Lord Stair, *Inst. L. 1. Tit. 13. § 3.* who notices the *Leges navales Rhodias*, § 14. *Si vector navem ingressus fuerit, qui pecuniam habet, eam apud exercitorem deponito, quod si non fecerit, aurum argentumve se perdidisse si dixerit, hi sermones ipsius irritæ propterea sunt, quod apud exercitorem non deposuerit.* And Welwood, in his Collection of *Sea Laws*, says, That if Money, or other Goods, be kept in a Coffer, the Skipper is only liable to purge himself by Oath. And that the Case of the *Caupones* & *Stabularii* is the same in Law with that of the *Nautæ*, will not be contested. And this is further confirmed by Decisions, as in the Case of *Hay* against *Williamson* in *Kinghorn*, which was Money in his Pocket; and yet the Defender was there assoillied: Which certainly must have been for this Reason, Because the Purse contained a 5 Guinea Piece, and other Pieces not so proper *ad quotidianum usum*; nor was that Purse particularly consigned or intimated to the Inn-keeper. And as to the Case of the Master of *Forbes*, it was a Cloak that was brought into a Tavern *ad quotidianum usum*. And as to the Sum, it was urged that such a Sum can never fall within the Words of the *Edict*, that is, *Ad eas quoque quæ mercibus accedunt*, such as *Vestimenta*, &c. *quæ ad quotidianum usum habemus*, i. e. *ad quotidianum usum* in Travelling. For so the same *Vivianus's* Opinion is repeated by *Paulus*, in *L. 4. in fin. ff. h. t. ut Vestimentorum penoris quotidiani, quæ hæc ipsa ceterarum rerum locationi accedunt.* It were absurd to say, That a Cloak-bag with 1000 Merks *accedebat* to the Horse and Saddle; or that it was for his daily Use in his Journey, as the *Vestimenta*, the only *Species* mentioned in the Law: So that the Money was not *Receptum* in the Sense of the Law, unless it had been specially intimated to the Defender, or put in the Custody of some Servant intrusted by him for such Uses. And the last Words of the same Law are certainly to be taken in Conjunction with the Words above-cited in §. 6. *Et puto omnium eorum recipere custodiam, quæ in Navem illata sunt*; which are to be thus understood, *Omnium, scil. Mercium & Rerum quæ Mercibus accedunt, veluti Vestimenta.* The Case of a Ship and of an Inn, justify this Sense: For as the Skipper is liable for the *Merces*, so is the Inn-keeper for the Horses. And these Things *quæ Viatoribus accedunt, sicuti Vestimenta, &c. quæ ad quotidianum usum habemus.*

Answered for the Pursuer, That the *L. 1. § 6.* makes *Receptum* to be *quæcunque res vel merces*: So that the *Edict* has been principally designed for the Advantage of Traders, and such as in Course of Business may be obliged to carry about any Subject of Value. This moves *Vivianus* to put the Question, Whether *Vestimenta*, and such daily Necessaries come under the *Edict*? which he determines they do, *quia mercedibus accedunt*; so that the principal Design of the *Edict* seems clearly to have been the Security of Travellers in their Money and Goods of Value: And such Things as are barely necessary for Travelling, fall under the *Edict* only *per Interpretationem*; and therefore here comes in the Rule, That *sive assignata, an etsi non sint assignata*, the Inn-keeper from his presumed Knowledge is liable. 2do. The Citation from the *Lex Rhodia* is not to the Purpose, that Law did not contain any *Edict* of this Kind. And the Roman Law did in this, as in several other Articles, amend the Laws

of *Rhodes*, which in this Case did only allow a simple *Actio depositi*, regulate by quite different Rules from the present Action.

Assor Sir James }
Nasmyth. Alter
Advocatus.

The Lords, in Respect the Pursuer came to the Defender's House at Mid-day, and only to Bait for about an Hour and an Half, without Design of any longer Stay, did, upon the 11th December last, Find the Defender liable upon the Edict. And upon a Reclaiming Bill given in this Day, their Lordships Adhered to their former Interlocutor, and Refused the Desire of the Petition.

Sir James Justice, Clerk.

DECISION XCVI.

[14th June, 1715.]

Sophia and Mary Shearers and their Husbands,

AGAINST

Janet Ker.

James Hodge, with Consent of the said *Janet Ker* his Spouse, grants an Heritable Bond to the saids *Shearers*, whereupon they were Infeft in some Lands in *Edinburgh*; Part of the Sum being paid, they thereafter Adjudge for a Ballance. And in a Process of Mails and Duties, Compearance is made for *Janet Ker* and *George Fleming* her second Husband, who also deceasing during the Dependance, the Pursuers applied after his Death to the Ordinary for a Hearing, and then craved that the Tenants might be decerned in the Mails and Duties, due at the Term subsequent to *Fleming's* Decease. And here again Compearance being made for the Relict, and her Infeftment produced,

It was *Answered* for her, 1mo. That she ought to be preferred to the Mails and Duties, with the Burden of the current Annualrent of the Ballance due to the Pursuers, because the personal Obligement upon which the Adjudication proceeded is Null *ipso jure*, and therefore (as to her) the Adjudication it self. So that the Pursuers could only recur to their Infeftment of Annualrent to which she had consented, which afforded only a Poinding of the Ground for the Annualrent of the above Ballance. 2do. She only consented to the Annualrent to be uplifted out of her Liferented Tenement; but not that it should be carried away for the principal Sum and whole bygone Annualrents.

Replied for the Pursuers, 1mo. That they pretend not to do Diligence upon the Wife's personal Obligement in the Bond, but to prosecute the real Right given them by both Husband and Wife; and tho' the personal Obligement be Null, yet that cannot stop this real Execution, to which she consented. 2do. An Heritable Bond in its ordinary Stile, and the Infeftment of Annualrent in the Legal Effect thereof, bears an Assignation to the Mails and Duties of the Tenement; so that the Liferenter cannot stop the Pursuers getting Payment of all their bygone Annualrents:

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As to which, this Action for Mails and Duties has the same Effect with a Process for Poinding of the Ground. And the Lords have found, That an Annualrenter, who is an Adjudger, may use the one or other Action at his Pleasure, and that they will have one and the same Priviledge and Effect: For the Pursuers Adjudication is not founded only upon the personal Obligement in the Bond, but proceeds upon the whole Obligements, and obtains Preference according to the Date of the real Right; because the Tenement it self is subjected to the Payment of the whole Sums contained in the heritable Bond; and the Liferentrix giving Consent to it, imports an Acquiescence to all that may follow upon it.

Actor Spotiswood. }
Alter Fleming. }

The Lords Found, That there can be no Mails and Duties upon the Adjudication founded on the personal Obligement in the Bond granted by the Wife Stante Matrimonio: But Found, That the Heritable Bond is a good Title for Poinding the Ground for the bygone Annualrents, and in Time coming.

Robertson, Clerk.

DECISION XCVII.

[14th June 1715.]

Donald Dounie and Others,

AGAINST

Graham of Drynie.

THE said Dounie and Three other Fishers, being Tenants in some Acres of Land to Drynie, for which they paid a small Silver Duty; but he had the Teind of all the Fishes they brought on his Ground, besides some other Casualties, such as Carriages, &c. they at Whitsunday 1712, do all suddenly remove from their Possessions, and carry off with them their Plenishing, &c. leaving only the Cropt upon the Ground: But in Harvest thereafter sent and made offer to him under Form of Instrument of their Year's Money Rent, and Caution for all other Debts which he should verify against them, and thereupon required Liberty to cut down their Corns, which Drynie refused; whereupon their Procurator protested against him for Damages, if he should hinder or divert them from Shearing or Ingathering their Corns, at any Time after the Date of the Instrument. Notwithstanding whereof, Drynie caused shear and inbring the Corns: Whereupon a Process of Spuillie being intented at the Tenant's Instance,

It was Answered for the Defender, 1mo. That Action of Spuillie is only competent to the Natural Possessor; but in this Case the Corns were deserted by the Possessors, and left open to the Defender's Possession. And it is observed by the Lord Stair, *Inst. Tit. Repar.* § 19. That a Spuillie of Corns was elided by the Defender's entring to the Possession of the Ground whereupon the Corns were growing; *Hope, Spuillie, Elliot contra*

The Lord of *Buccleugh*. And it is also observed by *Durie*, in a Case betwixt *Alison* and *Traill*, 8th July 1628. That a Defender being convened for a Spuillie of certain of the Pursuer's Goods, which were Libelled to be in the Defender's own House, the Lords found no Action of Spuillie could be sustained for the Goods Libelled to have been in the Defender's House, albeit the same pertained to the Pursuer. 2do. That what he did, was for preserving his Right of Hypotheque.

To all which the Pursuers opposed the above Instrument, wherein Offer was made of Payment of the Silver, and Caution for other Things which were Indefinite; and therefore concluded, That debarring by actual shearing of the Corns, and entring to the Possession, was in it self a Spuillie.

Actor ——— }
Alter *Boswel*.

The Lords Found the Defender's Intromission with the Goods Libelled, belonging to the Pursuers, was Illegal and Unwarrantable, and inferred a Spuillie, &c.

Sir James Justice, Clerk.

DECISION XCVIII.

[16th June 1715.]

Nisbet of Dean,

AGAINST

Watson of Sauehton, and Others.

DURING the Dependance of a Process of Ranking of the Creditors of *Dalmahoy*, *Henry Nisbet of Dean*, who was one of them, having deceased, the Decreet of Ranking is thereafter Extracted without calling his Son, nor is there any Procurator named as compearing for him; whereupon *Dean* having given in a Complaint:

It was Answered for the other Creditors, That Young *Dean* was perfectly apprised of this Process, and his Father's Interest; and that his Father was cited, compeared, produced his Interest, deponed upon the Verity of his Debt, &c. And even Young *Dean*, tho' not cited, yet *Liti sese obtulit*, in so far as he is marked compearing by an Advocate. And tho' the Advocate's Name be not insert, that is not material; for both Young *Dean* and his Doers did often push the Hastening of the Ranking, had seen the Minuts and Scheme, &c. as was instructed by Witnesses.

Replied for *Dean*, 1mo. That as the private Knowledge of a Debitor does not supply the Necessity of an Intimation in an Assignation, because it is a Form required; so neither Young *Dean*'s private Knowledge of his Father's Interest produced, and who died during the Dependance, will supply his Want of Compearance, for which it was necessary he should be cited; or else that he should make a Judicial Compearance. And as to what was alledged anent Young *Dean* and his Doers, Answered, That no Legal Compearance can be made up by Witnesses: For tho' a Citation be not necessary when a Party voluntarily lists himself, yet when he does

does so, it must be so marked Judicially, and contained in the extracted Sentence: And if it be not, a Witness cannot supply it; for these being *actus solennes*, just as in Executions of Hornings and Inhibitions, *Non queritur quid actum erat; sed quid instrumento comprehensum est*. Which holds much stronger in judicial Sentences; for nothing is there understood to be done, but what remains on Record under the Hand of the Clerk of Court. 2do. Seeing Legal Compearance must be by a Procurator, the Procurator ought to be named, especially that the Compearance here is not marked personally.

The Lords Found the Decreet of Ranking could not have the Effect of a Res judicata against Dean, and ordained him yet to be heard upon his Interest: But found the Decreet standing as to the other Creditors.

Sir Wal. Pringle }
for Dean. Alter
Arch. Hamilton.

Gibson, Clerk.

DECISION XCIX.

[16th June 1715.]

George Hillow,

AGAINST

Maxwel of Munches.

Hillow being Tenant to Sir George Maxwel of Orchardtoun, who constituted Munches his Factor; at Compring, the Tenant craved Allowance of 300 Lib. Scots, advanced and furnished by the Factor's Verbal Orders to Third Parties; and upon his Refusal to allow the same, commenced a Process, (after the Factory was ended;) wherein he offered to prove the Orders by the Defender's Oath, and by the Third Party's Writ or Oath, That he actually paid and delivered Victual, &c. to them.

Alledged for Munches, That the Pursuit was not now relevant, the Factory being recalled; for, allowing that such Orders were given, yet it was only as Sir George his Factor or Servant; and therefore he cannot now be liable, more than he had been really his Servant or Tutor. 2do. That the Libel was not relevant, unless the Pursuer offered to prove resting owing by Munches his Oath, conform to the 9th Act, Parl. 2. Sess. 1. Ch. II. the 5 Years therein-mentioned being long since expired in the present Case.

Answered for the Pursuer to the First, That it was never before pled, that a Factor's clearing Accompts with his Constituent, should liberate the Factor of Obligations contracted with Third Parties by him during the Factory: For altho' the Payments had not been made during the Continuance of the Factory, yet these Payments must still be binding upon him, whose Faith was follow'd. And the *Simile of Tutors*, &c. does not meet: For many Cases may occur where the Pupil is free, and yet the Tutor bound; as in case of Minority and Lesion when Money is advanced to Tutors, and by them misapplied. For in that Case, Action

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will be competent against the Tutor, Receiver, and Misapplier, altho' it be not demanded within the Years of the Tutorship. To the *Second, Answered*, That there was no Necessity of proving Resting, Owing, by the Defender's Oath; for altho' that took Place in the Case of Merchant Accompts, Servants Fees, &c. which by a special Act of Parliament prescribe in 3 Years *quoad modum probandi*; yet in the Case of Contracts, (such as a *Mandat*) the Order or Mandat is probable *Juramento* during the Mandant's Lifetime.

Actor Elphinston. }
Alter Ista. }

The Lords, before Answer, ordained Munches the Defender to Depone, Whether he gave the Orders Libelled to make the Payments founded on by the Pursuer? As also ordained the Persons alledged to have received these Payments, to Depone, Whether they received them from the Pursuer, or any for his Beboof?

Sir James Justice, Clerk.

DECISION C.

[16th June 1715.]

Lord Alexander Hay,

AGAINST

Mr. James Inglis of St. Leonards.

Lord Alexander Hay pursues the said Mr. James Inglis Brother to Mr. Patrick Inglis, for 1100 Merks, contained in a Bond granted by Nairn of Saintford and Hay of Naughton, to the said Mr. James, and assigned by him to a blank Person: Which Assignment being in the Custody of the said Mr. Patrick his Brother, it was transferred by him to William Stuart Merchant in Edinburgh before the Act 1696, and by him to Lord Alexander. Which Sum, notwithstanding, was uplifted by Mr. James the first Cedent, whereby Lord Alexander alledged that the Warrantice was incurred. And the Question turning upon this, Whether the Translation granted by Mr. Patrick Inglis to William Stuart, did instruct that the Assignment granted by Mr. James (which is blank in the Assignee's Name) did belong to Mr. Patrick?

It was *Alledged* for the Defender, That it could not instruct the same, because, *1mo.* The Assignment mentioned in the said Translation bears to have been granted to Mr. Patrick, *Nominatim*; whereas the Assignment produced is still blank in the Assignee's Name, and so cannot be the Assignment mentioned in the Translation. *2do.* The Translation amounts to no more than Mr. Patrick's own Assertion, which is no Legal Proof.

Answered for the Pursuer, *1mo.* Tho' the Defender's Assignment be blank, yet 'tis proper and customary in such Cases, for the Granter of the Translation to Narrate the Assignment as conceived in his own Favours: And this does rather support the Right, and shews that Mr. Patrick did claim the Assignment as his own. And the Reason why he did not fill up his Name in it, might have been to conceal it the better from

from his Creditors. 2do. Altho' the Translation it self be not a sufficient Proof, yet the Translation, together with the having the Assignment, does fully evince Mr. Patrick's Right to it, especially when there is no other Person pretends Right; for otherwise the Transmission of the greatest Part of blank Writs might be called in Question. And it is *Jus tertii* (now that it hath past thro' several Hands) to the Defender to controvert this, seeing he is denuded by the Assignment, which is presumed to have been delivered, being out of his Custody.

Aſtor Binning. } *The Lords Repelled the Defence, and Decerned: To which*
Alter Fleming. } *their Lordships Adhered, after two Reclaiming Bills.*

Gibson, Clerk.

DECISION CI.

[16th June 1715.]

Andrew Gordon and his Factor,

AGAINST

James Clark.

IN a Process of Mails and Duries at the said *Andrew Gordon's* Instance, against the Possessors of some Houses in *Aberdeen*, belonging to him as Heir Served to his Mother, who was Infeft therein on a Disposition from her Father, while her Brother was Alive; Compearance being made for the said *James Clark*, who had been Married to the Mother; And it being *Alledged* for him, That the Decreet could not go out, because he posselt by Vertue of the Courtesie, which Indefinitely takes place in all Heritage, wherein the Wife Died Infeft.

It was *Answered* for *Gordon*, 1mo. That here the Wife was no Heirefs, her Right being only acquired *Singulari Titulo*, and the Law says (*Heiresses*) and these have a Rank and Dignity to be kept up by their Husbands, which singular Purchasers have not; And this was found 2d June 1709, as observed by Mr. *Forbes*. 2do. The Lands in Question are Burgage Lands, wherein no Courtesie takes Place.

Aſtor Alex. Fal- }
coner, Alter Leith. }

The Lords, in respect the Tenements were Burgage Lands, Repelled the Defender's Alledgance founded on the Courtesie, and found he could have no Title thereto.

Mr. James Robertson, Clerk.

DECISION CII.

[17th June 1715.]

Agnes Nicolson,

AGAINST

Sir James Sharp of Stonniehill.

BY Interlocutor of the 17th February last, (which is Marked among the Decisions of that Session, and there the Case is also stated) the Lords found, That the Defender must Compt for such of the

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Debts

Debts in the Disposition, whereof the Instructions came to his Father's or his own Hands, to Extinguish his Adjudication.

Now the Defender Alledges, That if this hold, it must conclude, that wherever a Bond, Ticket, or Accompt is Assigned in Security, and the Instruction of Debt delivered, the Assigney must Compt, which would seem contrary to the Current of Decisions: As particularly 27th December 1709, betwixt *Smith* and *Vint*, where such an Assigney was not found bound to Compt for a Sum so Assigned to him, tho' the Debtors had become Insolvent, and the Debts Prescribed, while the Instructions were in the Creditors Hands. Nor, 2do. Will Young Sir *William's* Accepting of the Disposition, using it, and uplifting Sums by it, be Relevant to infer the Conclusion in the Pursuer's Libel: For tho' the Defender should Compt for Intromissions, yet by the Nature of the Right he is still exeemed from Diligence, as was lately found betwixt *Home of Kaims* and *Home of Renton*; and again 22d July 1709, *Duncan* contra *Graham*. It is true, the common Debitor, or any in his Right, may oblige the Receiver of a Right for Security or in Relief, to Denude, or give up Instructions upon Payment: But it can be no sooner done, without overturning our known Laws. And therefore even before the Defender can be decerned to Exhibit, the Pursuer must offer Payment or Security.

Answered for the Pursuer, That she barely craves the Defender should be found Liable, either to hold Compt for the Sums, or produce the Instructions, and say they are yet unpaid and undischarged: So that *Esto in eventu*, he should be Exonerated from doing Diligence, yet nothing can ever cover him from being Liable either to produce the Writs, or hold Compt for the Sums: And this because, tho' the Assignment may give the Defender Preference for his Relief, yet the Pursuer ought to be allowed to affect the same in her due Place; nor can the use of them be denied her, for making them effectual for her Payment, after the Defender's.

Replied for the Defender, That his Father's Right for Relief and Security, having still a Preference, so long as the Disposition is not offered to be reduced, the Pursuer cannot pretend to have any Interest in the Subject, before the Defender be Relieved and Paid.

The Lords found the Defender ought to Exhibit such Instructions of the Particulars Disposed, as came to his Father's or his own Hands, or to hold Compt therefore; Reserving all his Defences as to the Application of the Sums, for which he should hold Compt, whether to the Grounds of his Adjudication, or other Debts: And also, how far his Father or he are bound for Diligence, the Right being granted for Security and Relief.

Ador Hay. 2
Alt. Nasmitb. 3

Mackenzie, Clerk.

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DECISION CIII.

Eodem Die.

The Magistrates of *Aberdeen* and their Fiscal, and *John Craig Baxter* there,

AGAINST

David Speediman late Deacon Conveener. and other Members of the Conveener Court there.

THE said Conveener and his Brethren, having Pronounced two Decrets in *March 1712*, one against the said *John Craig*, for the Ballance of an Accompt due to the Trade; The other Amerciating one *Alexander Duff*, for Calumniating the said *Craig*; upon a Complaint hereof given in to the Magistrates by their Fiscal and *Craig*, they found the laids two Decrees or Acts unwarrantable and illegal Incroachments upon the Office of the Magistrates, and therefore ordained the Conveener to cause Raze them out of the Record of his Court, under pain of 100 *Lib.* And decerned him to pay to *John Craig* 20 *Lib. Scots* of Damages; Reserving Action to the *Baxter Trade* against the said *Craig*, for what he may be justly resting, and to *Craig* for the Verbal Injuries, before the Judge competent as Accords: This Sentence being Suspended, and coming in by a Report before the Lords, the Question turned upon the Power of the Conveener Court, and whether the Magistrates could Cognosce upon these Sentences.

And it was *Alledged* for the Suspenders, That not only was there an Indenture betwixt the Town-Council and Incorporations, whereby the Town was not to Meddle with any Thing relating to the *OEconomy* of the Trades among themselves (which is the present Case, the one Decreet being concerning their Box, ordaining the Box-master's Ballance to be paid in; and the other anent Contumely offered in Face of Court) but also by the 39. *Act. Parl. 2 Ja. 1.* It is Statute, That ilk Craft shall have a Deacon for Governing and Essaying all Works, before the Craftsmen of that Craft: And that the Deacons likewise had the Correction of thir Trades, is plain from Diverse Acts of Parliament, Rescinding particular Statutes made by the Trades, but never altogether Discharging the Statutes and Regulations for the Future. And King *James VI.* by his Grant in Favours of the Trades of *Edinburgh, Perth, Dundee* and *Aberdeen*, Dispences with a former Act of Parliament, whereby Deaconries are Abolished, and allows to the Trades of these Burghs, not only to Choose their own Deacons; But also, *ut faciant licita Statuta et Ordinationes ad Conservationem boni ordinis inter artifices.*

Answered for the Chargers, That giving Decrets for Payment of Money, and Amerciating for a Contumacy, was what did not fall under the *OEconomy* of the Trades, which only consisted in the choise of their Members: The Regulation and Inspection of the Subject of their respective Trades, the seeing to the Sufficiency of their Work, and Managing and Distributing their Publick-Box, and the Specialities abovementioned make no Alteration. For, *imo.* The Trades have no such Power even as to what may concern their Boxes, For suppose the Box-master be in

Arrears, yet they could not give a Decreet for Money, but that behooved to be Pursued by the Incorporation before the Civil Judge. Nay, otherways, by the same Reason, they might give Sentence against any Man to whom they had lent Money. But as no private Man as to his own Stock can *sibi jus dicere*; So no more can an Incorporation with respect to their Box. 2do. As to the Fine; this is yet more Irregular; For tho' they can stop a Tradesman, and so in a Manner Punish for Insufficient Work; yet to Fine for Opprobrious Language, is no more proper to them, than any other Extraneous Act. And all they could do in this Case, was to Pursue before the Commissary Court, or Baillies, or Magistrates *qua* Justices of Peace, and Libel the *Locus Delicti*, as an Aggravation. And as to the Act of Parliament, King James's Grant, &c. *Answered*, That the above Clause could not be Stretched to a Right of Magistracy or Power in judging or making Statutes, furdur than in Things Indispensably Necessary, and relating to their several Trades, such as sufficiency of Work and Intrants, disposing of their Publick Money, &c. but cannot be extended to the Judging in Civil or Criminal Cases for Blood or Blows, or Point of Right, altho' among the Brethren of the same Craft.

It was further *Alledged* for the Suspenders, That the Magistrates had here assumed a Power not Competent to them, to reduce Sentences of other Courts; and if the Conveener Court committed Iniquity, the Reduction was Competent elsewhere; far less could the Magistrates Fine the Conveener, or Decern any Damage to the private Party, who should have meaned himself by Suspension or Reduction, and in effect this was to be Judges in their own Cause, *viz.* to Establish their Jurisdiction over another Court, which they ought previously to have done by a Declarator before the Lords.

Answered for the Charger, *imo.* That suppose the Trades had the Power contended for, yet it is but Subordinate to the Magistracy of the Burgh, as was found lately in the Case of the Town of *Dundee* and their Trades, even in the Matter of their proper *Oeconomy*. 2do. The Magistrates here were not in a Reduction of Sentences of a Court, but in Repressing a Disorder and Usurpation of a Jurisdiction that wanted all Foundation; so that they were properly Punishing a Crime, ordaining such Acts to be Razed, and Parties Leased to be Redressed: For since the Trades had no such Power and Jurisdiction, they could be in these Particulars no more considered but as private Persons; And if every private Man or Society of Men within a Burgh, should set up a Court, and assume a Jurisdiction, it were very odd to think the Magistracy could not prevent and punish this. And hence it also follows, That there was no necessity of a previous Declarator, no more than previously to the Magistrates punishing any Disorder within their Burgh, for which they have an Inherent Jurisdiction.

Lastly, there was produced a Disclamation from *John Craig*, the Person against whom one of the saids Decreets did pass; and the Suspenders contended, That since he is the Person lesed, the Letters ought to be suspended.

Answered for the Charger, That the Charge was carried on in Name of the Magistrates and Procurator-Fiscal against the Deacon Conveener,

for

for assuming a Jurisdiction within the Burgh; which being a Crime in it self, cannot be purged by the said Disclamation.

Ador Sir Walter
Pringle. Alter Arch:
Ogilvie.

The Lords Found the Letters orderly proceeded, for Razing the two Decreets mentioned in the Decreet charged on, out of the Conveeners Records, in regard they are pronounced by Persons having no Power to hold or fence Courts; reserving to the Suspenders their Right of making By-Laws for regulating the Subject Matter in that Decreet anent the Boxmasters, or any other Subject, for the better regulating their own Corporations: But Suspended the Letters for the 100 Lib. of Penalty, and 20 of Lib. Damages.

Gibson, Clerk.

DECISION CIV.

[. 21st June 1715.]

Sir George Innes of Coxstoun and James Wiseman his Assigney,
AGAINST
James Chalmers.

Here being an Apprising of the Lands of *Linkwood* led in Anno 1671, for 6000 Merks Principal, which is now by Progress in the Person of the said *James Chalmers*, there was a Contract entered into betwixt his Authors and common Debitor in Anno 1672, Restricting the Apprising to the accumulat Sum of 8000, and declating it purgeable for 6000 if paid at *Whitsunday* thereafter: As also, in anno 1685, there is another Contract, restricting also the accumulat Sum again to 8000 Merks, and assigning a Locality of certain Lands for Payment of the Annualrent of the Sums apprised for. The Right of Reversion being competent to Sir George Innes and his Assigney, as coming in Place of *Gibson* of *Linkwood* the Debitor, there was an Order of Redemption used at the Assigny's Instance, and now in a Process of Declarator of Redemption, this Point came to be Advised, viz. How far a Contract, relative to the Apprising entered into within the Legal, and assigning a Locality as said is, should not only be good against the Contractor and his Heirs, but even against *James Chalmers* a singular Successor? And,

It was Alledged for *James Chalmers*, That however such Contracts or Back bonds might affect Apprisings, while within the Legal, and not compleated by Infestment; it was against the Nature of heritable Rights, that these should be clogged with Backbonds, which were latent, and being in no Register, could not be known by Purchasers; and that Infestment had followed upon this Apprising after the Legal had expired, after which the Effect of any Backbond behooved to cease, as was found 21.

July 1636, King contra ——— And 10 March 1629, Schaw ——— And this is Viscount *Stairs* Opinion, Tit. Assignations, P. 37. § 21. where he says, "That because Apprisings within the Legal may be taken away

“ in the same Manner as personal Rights, Therefore Adjudications, Dis-
 “ charges, and Backbonds by these who have Right to the Apprising
 “ are effectual, if thereupon the Matter be made litigious before expiring
 “ of the Legal or Inhibition used thereupon, they will be effectual
 “ against singular Successors, even after the Legal is expired : But after
 “ expiring of the Legal, Infeftments upon Apprisings are in the same
 “ Manner as upon irredeemable Dispositions : For they are the Foun-
 “ dation of the Rights of most Lands in the Kingdom ; and if personal
 “ Rights should make them unsecure after expiring of the Legal, it would
 “ be of great Inconveniency. And this also is conform to a Decision, 21st
November 1673. Brown contra Gairns, Where the Lords found a Back-
 bond affected the Apprising before Infeftment. As also, to another Decisi-
 on 6th *July 1661, Telfer contra Maxton*, where the Lords repelled an Al-
 ledgance upon a Bond relating to an Apprising, as not affecting singular
 Successors. And besides all this, the great Inconveniencies, if such latent
 Bonds or Contracts should affect singular Successors, are too obvious to
 be mentioned.

Answered for *Cockstoun* and his Assigney, That the Contract 1685.
 having plainly qualified and turned the Apprising into a redeemable
 Right, and no Infeftment having been upon this Apprising before the
 Date of this Contract, it is be remembred, that the Arguments for the
 other Side, do chiefly relate to voluntar Conveyances, as to which the
 above Position is freely owned : But the Case was still otherwise in
 Apprisings within the Legal, which were lookt upon as *pignora judiciale*,
 and which did not denude the Debitor : So that no Man was ever
 secure by acquiring of such, but was still subjected to the Hazard of all
 Deeds within the Legal. Thus they are extinguished by any Payment,
 Intromission, Compensation, &c. All which will meet singular Successors.
 Nay, it's known, that Creditors do dayly for Conveniency assign, in
 order to leading Adjudications, and rest secure upon Backbonds ; which
 would be very unsecure, if the Assigney, being Infeft and transferring
 the Right to Strangers, should evacuate the Force of the Backbonds.
 So that such a Backbond being granted within the Legal, tho' it should
 afterwards expire, yet the Apprising stands still affected, in regard per-
 fectly qualified and Impressed, while it was of the Nature as to receive
 that Impress. As to the Authorities adduced. 1^{mo}. The Two Decisions
 first quoted, do plainly concern voluntar Conveyances. 2^{do}. The Lord
Stair his Assertion is misapplied, for all that he says there, is, That Assign-
 nations to incompleat, real Rights, as Apprisings, Dispositions of Lands
 before Infeftment, &c. are affected with the Assigny's Backbond, if the
 Competition come in before Infeftment : He is not there determining the
 Point, how far Apprisings within the Legal may be affected with Back-
 bonds, but how far Assignations to incompleat real Rights (where Dis-
 positions are brought in as well as Apprisings) are affected, &c. But he
 is not there treating of the Nature of Apprisings within the Legal, which
 he is *ex professo* treating in another Place, viz. *Tit. Dispositions, P. 397.*
 where he says, Apprisings are excluded and qualified by the Backbonds
 and Obligements of the Apprifer ; and this was so found 13th *July 1666*
Earl of Southesk contra Marquis of Huntly, where an Apprising was
 found taken away by a Backbond, even in Prejudice of a singular Suc-
 cessor.

cessor. As also, 6th July 1676, *Gordon* and *Cheyne* contra *Crawfurd*; where it is *in Terminis* decided, That Backbonds do affect even as to singular Successors, tho' *extra corpus juris*. And as to the other two Decisions cited for the other Side, in the First it does not appear that the Bond there in Question had a Reference to the Apprising, but was an extrinick Bond of Communication. And as to the other, it is there found, That the Backbond was sufficient to affect the Apprising, being before Infeftment; but still that does not exclude likewise the other Position, That also within the Legal it affects it, whether Infeftment follow or not. Lastly, Here *Chalmers* (as appears by his Disposition) only acquired Right to the Apprising, with all Hazards that did attend it, and paid only 8000 Merks, which is the very Sum to which the Apprising was restricted, and the Disposition bears only Warrandice from Fact and Deed; so that he was not buying the Lands of *Linkwood*, but only the Apprising, as a Security for his Money.

Altor Sir Walter Pringle. Alter Olivestop.

The Lords, in respect the Contract 1672, restricted the Comprising to a lesser Sum; and in regard that the Contract 1685 Wadsets Part of the comprised Lands, redeemable for the Sums in the Comprising, and Possession conform, both Contracts being within the Legal; and that the Defender's Purchase of the Comprising was for the Sum in the Wadset, and not for a Sum equivalent to the comprised Lands; they repelled the Defences, and found the Comprising still redeemable.

Mackenzie, Clerk.

DECISION CV.

[23d June 1715.]

Catbarine Simson, and David Keltie her Son,

AGAINST

Halliday of Tilliboll and Others.

A Declarator being raised at the Instance of the said *David Keltie Tilliboll's* Feuvar, against his Superior, who had exacted both at his Father's and his own Entry a Triple of the Feu-duty; whereas, by his Charter he is only liable to pay a Double *primo Anno introitus*, and had also taken away a Cow and a Mare upon the Pursuer's Father's Decease by way of *Herezeld*; and concluding Restitution of the 2 Years Feu-duty *indebite* paid; as also Restitution and violent Profits for the Cow and Mare, as in a common Spuillie; concluding also a Declarator of his Freedom from these in Time coming.

As to the Point of Right, answered for the Defender, That a Feu-duty being only a Taxing of the Service during the Time that the Fee is full; as when the Fee falls in the Superior's Hands by the Death of the Vassal, *in Feudis rectis*, the Vassal must either pay a full Year's Rent, or whatever is taxed by the original Charter; so in Feu-holding, the

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Obligation to double the Feu Farm, is nothing but a taxing the Relief to a double Feu-duty, and is quite different from the Annual Prestation. Therefore, as in other Holdings, the Vassals are bound to pay the Relief beside the ordinary Prestations, so in Feu-holdings, by and attour the current Feu-duty, the Vassal ought to pay the Sum to which his Relief is taxed, which does not respect the Annual Prestation, which is due *ex Natura Feudi*.

Replied for the Pursuer, That there can be nothing with more Clearness exprest than commonly the *Reddendo* of these Charters is, *viz. Duplicando Feudifirmam*; which, according to the Defender's Way of Arguing, would be *Triplicando*. But 'tis plain, both from the general Custom of the Country, and from the Words of such Charters, that one Year's Duty is payable as the current Prestation, and another as the *Laudemium* or Relief; which is also consonant to the common Feudal Customs: Besides that, the Crown (whose Practice in such Cases ought to be a Rule and Standard for all subaltern Superiors) never exacts more from Feu Vassals but the Double.

Duplied for the Defender, That tho' the Sovereign *ex gratia* gives Abatement of one Year, (which is no Rule for others) yet the *Capiendo Securitatem* is always for 3 Years.

As to the *Herezeld*, *Answered* for the Defender, 1^{mo}. That a Feu-Charter being a mix'd Right, having something in it of the Nature of Vassalage, and something in it of the Nature of Tenantry, the Vassal considered as the Superior's Tenant, may be liable to the Prestations of Tenants. 2^{do}. The Defender's Charter not being granted *cum Herezeldis*, he as Vassal, not being thus excoemed from that Burden, may be liable, as all are who die upon a Master's Ground.

Replied for the Pursuer, 1^{mo}. That 'tis the first Time it was ever pled that a Vassal was liable in a *Herezeld*; and it is redargued not only by the *Reddendo* of the Charter, (which is certainly the Rule as to the Vassal's Prestations) but by the uniform Custom of the Nation. 2^{do}. Tho' the Defender's Charter be not granted *cum Herezeldis*, yet that imports no more, but that he shall not have Right to exact the *Herezeld* from his own Tenants, which otherwise he could do, if that Clause were insert in his Charter: But the Want of that Clause can never import that he is liable in the *Herezeld*, since by the Nature of his Feudal Contract he is exempt from all Burdens whatsoever, except either such as are expressly contained in his *Reddendo*, or are the *Naturalia* of his Fie, whereof the *Herezeld* is none.

As to the Second Thing Libelled, *viz. Restitution*, *Answered* for the Defender, That whatever may be said as to the Point of Right, yet he cannot be liable to repeat what's already paid; because Payment was made by way of Transaction; wherein *quid pro quo* was given by the Defender, *viz.* his granting Precept of *Clare*, and so saving the Pursuer the Trouble of Serving, Retouring, Charging the Superior, &c.

Replied for the Pursuer, That the said Payment being made ignorantly, Repetition is undoubtedly competent: Besides, that there could be no proper Transaction here, since the Superior in receiving his Vassal, did nothing but what by Law he might have been compelled to.

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As to the Restitution of the *Herezeld*, violent Profits, &c. *Answered* for the Defender, 1mo. That his Infeftment *cum Herezeldis* is fufficient to excuse a Spuillie. 2do. That Masters in that Part of the Country, particularly the Defender, have been in constant Use of exacting an *Herezeld*, nor has ever fuch Exaction been quarrelled to this Day.

Replied for the Purfuer, 1mo. That fuch a Clause in the Defender's Charter can never afford him any Title to exact a *Herezeld* from a Vafal, whose *Reddendo* is his fole Rule. 2do. The constant Use of fuch an Oppreffion rather loads than excuses the Defender.

The Lords Found Tilliboll liable in Repetition; to which their Lordships Adhered, after a Reclaiming Bill, without Answers.

Gibfon, Clerk.

DECISION CVI.

[23d June 1715.]

James Forret,

AGAINST

The Representatives of James Carstairs.

IN a Procefs of Aliment at the Instance of *Forret* againft the Children of Baillie *Carstairs*, as Representing Mr. *Thomas Finlay* School-mafter at *Drumeldrie*, whom the Purfuer, who kept a publick Boarding-houfe, had entertained feveral Years; thefe Three Points coming to be difcufft, *viz.* 1mo. How far Aliment is due for a Major without Paction? 2do. From what Time the Three Years Prefcription of fuch Proceffes does commence? 3tio. Whether the proponing Prefcription does infer Acknowledgment of the paffive Titles?

And it was, as to the Firft of thefe, *Answered* for the Defenders, That it is an uncontroverted Principle that no Action for Alimenting a Major can be intended, except upon Paction; feeing 'tis prefumed to be done out of Friendfhip, or fome other Refpect: Otherwife it is prefumed that he paid for his Entertainment at the Time.

Replied for the Purfuer, That there is an Exception fet down immediately after that Rule by my Lord *Stair*, *Lib. 1. Tit. 8. viz. Unless it be in fuch Houfes where they ufually Aliment for Money*: And that becaufe in this Cafe, the weightier Prefumption overballanceth the Weaker. And this Exception is founded on an exprefs Act of Parliament, *Ja. VI. Parl. 6. Cap. 83.* For there *Mens Ordinaries* not founded upon Writ, are to be purfued for within 3 Years, otherwife no Probation allow'd, except by Oath of Party; *ergo a contrario fenfu*, where a Party can neither prove by Writ nor Oath of Party, *Mens Odrinaries* can be purfued within three Years.

Duplied for the Defenders, That tho' *Mens Ordinaries* may be purfued within 3 Years, without founding either upon Writ, or offering to prove by Oath of Party; yet ftill it remains neceffary that the Purfuer found

on a Paſſion, which in that Caſe he may prove by Witneſſes. *Mens Ordinaries* in the Act of Parliament ſignifies plainly their Entertainment, and is not confined ſimply to that Senſe we generally take the Word in, when we ſay, *Such a Man keeps an Ordinary*; and therefore, if the Purſuer's Senſe of the Law were taken, any Perſon, tho' neither *Cook* nor *Vintner*, might purſue thoſe to whom they had given Meat and Drink within 3 Years, as well as *Cooks* and *Vintners*, which would intirely evacuate the Rule anent Aliment due only *ex pacto*.

As to the Second Point, *Answered* for the Defenders, That the Purſuit can go no further than 3 Years, immediately preceeding the Citation; becauſe in the Act of Parliament, anent the 3 Years Preſcription, *Mens Ordinaries* are expreſſly mentioned. And in the other Preſcriptions of that ſame Nature, tho' the Obligations continued for more than 3 Years, yet the Lords have always reſtricted the Purſuit to 3 Years preceeding the Commencement of the Proceſs, as in the Caſe of Servants Fees, 12. Feb. 1680, *Rofs contra Maſter of Salton*; and the *Ratio Decidendi* given by the Lord *Stair* is, That 'tis to be preſumed that Servants Fees being for their neceſſary Proviſion, muſt be frequently paid; which Reaſon in the preſent Caſe holds much ſtronger.

Replied for the Purſuer, That the Speciality here is, that the preſent Proceſs is not againſt the Perſon himſelf, but his Representatives; and therefore the Interval from his Deceafe to the Time of raiſing of the Proceſs, cannot be reckoned any Part of the 3 Years: But in this Caſe, the 3 Years which the Law preſumes may be owing, or rather the Time at which he ceaſed to be Alimented; for the Proceſs could not well commence ſooner.

As to the Third Point, *Answered* for the Defenders, That tho' propoſing peremptory Defences generally exempts the Purſuer from proving the paſſive Titles, yet where either Dilatory Defences are propoſed, or Objections againſt the Relevancy of the Libel, here there is no Right peculiar to the Defunct aſſumed, (as in the Caſe of propoſing Peremptors) it being proper for any Man to ſay, That either he is not legally cited, or not before a proper Judge; or that the Facts Libelled upon do not infer the Concluſion. And of this laſt Sort is the preſent Defence, *viz.* That the Defunct's having barely Dieted with the Purſuer, did not infer an Obligation upon him to make Payment, and that neceſſarily the ſame continued yet due, unleſs the Purſuer Libelled a poſitive Paſſion, and that the ſamen was yet reſting owing: For this is properly not ſo much a Defence, as an Objection againſt the Relevancy of the Libel.

Replied for the Purſuer, That as the propoſing Preſcription is undoubtedly a peremptory Defence; ſo there is no Principle of our Law better eſtabliſhed than this, That ſuch a Defence cannot be propoſed, without acknowledging the paſſive Titles: For how can a Defender propoſe a Defence competent to his Predeceſſor, without acknowledging that he Represents him?

Aſtor *Graham*. }
Alter *Jo. Falconer*. }

The Lords repelled the Defence, That there was no Paſſion; and found an Aliment due 3 Years before the Citation; and found the Defender cannot propoſe Preſcription, without acknowledging the Paſſive Titles.

Gibſon, Clerk.

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D E C I S I O N CVII.

Eodem Die.

William Muirhead,

A G A I N S T

The Lord Colvil.

THE Lord Colvil, as Heritable Baillie of the Regality of Culross; having Installed William Muirhead as Clerk of Court during Life; for which his Lordship got 1200 Merks; he continued in the Exercise of that Office for 6 Years or thereby, till my Lord having failed to take the *Abjuration* imposed by the Government, the Court became Vacant for want of a Judge: Whereupon Muirhead raises a Process against my Lord, for Repayment of the Money, Annualrent, Damages, &c. upon this Head, That by his Lordship's Fault the Office was rendered useless, and therefore he was liable in Repayment and Damages.

Answered for the Defender, That tho' a Seller be generally liable in Case of Eviction, yet where it falls out through an unforeseen Accident, falling out after the Sale, he cannot be liable, the Contract being *uberri-mæ Fidei*; and therefore nothing can be understood to come unto it, but what both Parties had probably in their View at Contracting: Now the imposing of new Engagements by the Government could never be in their View at making the Bargain. And this is plainly exprest in that Famous L. 11. ff. *De Eviction*, where this general Rule is laid down, That *Venditor non tenetur prestare (futuros casus) evictionis*. And is also the Opinion of Cujace, *Consultation* 38. where, in a Case parallel to the present one, he plainly asserts, and that from the Authority of the above-cited Law, That *Inopinati casus evictionis post Venditionem & Traditionem ad Venditorem non pertinent*.

Replied for the Pursuer, That the Nature of the Thing implied, that my Lord should keep Courts by himself or his Deputes; for *Concessa alicui Jurisdictione, cuncta ea, &c.* The Pursuer could not exercise his Office without a Court, nor can a Court be without a Judge; and by the Defender's Fault there was neither Court nor Judge: And the not taking the *Abjuration* is of it self a Fault, since the Law enjoins it. However, by the Nature of the Clerk's Commission, which was upon an Onerous Cause, it is implied, That my Lord is obliged to have a Court there.

Duplied for the Defender, 1mo. That whatever Obligation he might stand under to the Government, yet he was under none to the Pursuer, to give an Active Obedience to all Laws that should after this Contract be imposed. For it could never enter into the Minds of Contractors, that either Party should be obliged, with respect to one another, to take all the Engagements that a Government should come afterwards to lay upon either of them; seeing this were in Effect to oblige themselves to do a Thing which perhaps they might come to think not agreeable to Conscience. 2do. That the not taking the *Abjuration* was not a *Culpa* even with Respect to the Government; because the Law here has had its Force, by my Lord's ceasing to act, and to impose a greater Penalty

by condemning him to the Pursuer for not Acting, were to extend the Law beyond Intention.

Astor Boswe. }
Alt. Jo. Falconer. } *The Lords sustained the Defence, and Assoillied.*

Gibson, Clerk.

DECISION CVIII.

[24th June 1715.]

Murray of Mount-Lothian,

AGAINST

Deacon Brownhill.

DEacon *Brownhill* having obtained Jedge and Warrant from the Dean of Gild, for taking down and rebuilding a ruinous House belonging to him in *Blackfrier's Wynd*, (on Report of Tradesmen that it was Ruinous) on the North End whereof there is a House belonging to *Murray of Mount-Lothian*, which has a Servitude upon the said Ruinous House, constitute by long Possession; whereby it is obliged to receive and support *Mount-Lothian's* Joists, and laid-to Chimneys in the North Gavel. The Deacon having accordingly taken down the Gavel, and now about to build it up of new,

It was alledged and inferred by *Mount-Lothian*, That since there was a Necessity for *Brownhill's* Conveniency to take down his laid-to Vents, that the same must be done, and they likewise rebuilt upon *Brownhill's* Expences, because the using of Property must be always without Prejudice to a Servitude established; for there is the same Reason for this, as for *Brownhill's* supporting the Joists until the Gavel be rebuilt. 2do. That in a late parallel Case betwixt the Duke of *Roxburgh* and Town of *Dumbar*, the Duke being to Inclose some Ground through which the Town had a *Servitus Via*, the Lords ordained him to put up Gates for Horses and Carts to pass, for preserving the Servitude.

Answered for Deacon *Brownhill* to the First, That 1mo. It is directly contrary to the Nature of a Servitude, which consists allenarly in *patiendo non in agendo* 2do. Tho' Property must not prejudice Servitude, yet here the Gavel was not taken down only for the Deacon's Conveniency, but from plain Necessity, as appeared from the Tradesmen's Report; yea and really for the Utility of the Servient Tenement it self; since otherwise it must have fallen, and then *Mount Lothian*, without rebuilding it himself, would have had no Gavel to lay his Vents to: So that this is the same Case as if the Gavel had fallen by Accident. To the Second, answered, That what the Lords there ordained, was doing no Deed in Favour of the Town of *Dumbar*, since the putting up the Gates was necessary for the Duke, and the Town would have been willing he had put up no Gates, but left all open.

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Colvit for Mount-
Lothian. Alter-Ro.
Dundas.

The Lords Found the Builder of the Wall liable to a Servitude oneris ferendi, both of the Joists and laid to Chimneys: And must not only build that Wall in the Condition it was in formerly for supporting both Joists and laid-to Chimneys; but likewise that he must build and lay-to the Chimneys as they were before the taking down thereof at his own Expences. Vide 14th July 1715.

Mackenzie, Clerk.

DECISION CIX

[24th June 1715.]

The Gubernators and Treasurer of *Heriot's Hospital*,

AGAINST

Hepburn of Bearford.

IN a Declarator of Nonentry at the Hospital's Instance against *Bearford*, he repeated a Declarator, That his Lands, by the several Acts of Annexation of the Superiority of Church Lands, were annexed to the Crown, and that therefore it should be found he was the Crown's Vassal, and therefore not liable in Nonentry to the Hospital: The Lords, after full Hearing, did, upon the 13th February 1714, Find, That the Clause in the 13th Act, Anno 1633, declaring, That the Barony of Brugh-toun, &c. should remain with the Earl of Roxburgh, his Heirs, &c. after the Tenor of his Infeftments, did not exeem the Superiorities of the Lands from the Annexation, in the 10th and 14th Acts of that same Parliament, and Repelled the Alledgance founded on the last Clause of the 53d Act of Parliament 1661; as also the Defence of Prescription: And therefore as-soillied *Bearford* from the Declarator at the Hospital's Instance, and Decerned and Declared in the Declarator repeated by the Defender.

This Cause having come in by way of Appeal before the House of Peers, they, by their Decree upon the 2d instant, ordered and adjudged that the foresaid Interlocutor was Reversed; and declared that the Superiority of the Lands in Question should belong to the Hospital the Appellant.

Upon the Hospital's Application, That this Decree might be applied by the Lords, and that they would declare the said Hospital the only Superior of these Lands, and the Defender to be their Vassal, and decern the Defender in the Quantities Libelled, or allow them a Term and Diligence for proving their Libel.

The Defender Answered, That as to the first Part of the Petition, the Lords could now declare nothing: For if the House of Peers had only reversed the Lords Sentence, then indeed the Hospital behooved to proceed as if that Sentence had not been given. But since the House had ordered and declared, That the Superiority of the Lands in Question, &c. the Matter is not now before the Lords as to the Point of Declaring, but the Hospital must take their Sentence as they have it. 2do. As to the

Second Part of the Bill, *Answered*, That there can be no Decernitur in the Nonettry, because the Lands hold Feu, which is the Retoured Duty, and is ready to be paid at the Bar. No Decernitur for the full Mails and Duties, because the Interlocutor of the Peers being only pronounced upon the 2d of June instant, and that *Bearford* had a very probable Title, *viz.* The Lords Sentence, and former Decisions; such as that betwixt the Earl of *Lauderdale* and *Castlebrand*, and that there was not a Term run, in regard of the Defender's Offer to take a Charter from the Hospital.

Aitor Graham. Alter }
Sir Walter Pringle }

The Lords Decerned in the Declarator at the Hospital's Instance, with this Quality, Purgable on Payment of the bygone Feu Duties preceeding Whitsunday last, and a Year's Rent, as a singular Successor, at the Time of his Entry; and in case of his Neglect to obtain himself Entered, found him liable for the whole Mails and Duties. Vide 27th July 1715.

Gibson, Clerk.

DECISION CX.

[28th June 1715.]

Isabel Duncanson and her Assigney,

AGAINST

James Duncanson.

RObert Duncanson of Garsbake, by his Latter-will, provides the said *Isabel* his Daughter (a Minor) in 500 Merks, payable by her eldest Brother the said *James Duncanson*, out of the readiest Moveables, at her Marriage or Majority, but bearing no Annualrent: And in the same Testament, there is subjoined a Nomination of Tutors and Curators to his Children, of whom Three to be a *Quorum*, and the eldest Brother *sine quo non*; with Power to them to intromet with his Rents, &c. for the Childrens Education. *Isabel* coming to be *in confinio Majoris atatis*, enters into a Co-partnery with another Woman who was a Shop-keeper; and in regard she was to furnish the Half of the Shope with Wares, her said Brother paid out for her 22 Lib. Sterling, for Goods, and bestowed the remaining Ballance of the 500 Merks for her Board, Cloathing, &c. and took a Discharge of the Tocher from her, being authorised by her other Curators, who, as taking Burden for her, do subscribe the same with her.

Of this Discharge, she and *Thomas Hall* her Assigney, raised a Reduction *ex capite minorennitatis & lésionis*, and it was alledged for them, as to the 22 Lib. Sterling, That the Brother could not be in *bona fide* to pay the same, either to or for the Minor, since he was expressly bound up by the Words of the Testament, whereby the Tocher was only payable at Majority or Marriage. Nor, 2do. Did the Consent of the other Curators validate the Discharge, since himself was *sine quo non*; nor could he be *Auctor in rem suam*, and Consent to a Discharge granted to himself.

An-

Answered for the Defender, 1mo. That as the Stock bore no Annual-rent, so altho' it had, so small a Sum could never be a Fund for the Minor's Maintainance; and therefore his bestowing part of the Stock for putting her in a way of Living, was certainly both Prudence and Piety; and is nothing that is *novum*, but a Course very commonly taken by Parents with their own Children; specially that the Goods purchased were not absolutly intrusted to her self, but another who was habite and repute to be of Integrity and Skill in the Trade, joined with her. 2do. Since he could not be *auctor in rem suam*, the Authority of the other Curators in this Case was undoubtedly sufficient: It being universally received, that when any Affair occurs betwixt a Minor and one of his Curators, the Authority of the others is sufficient; since otherwise Affairs of this kind could never be extricate.

The Pursuer having also insisted for reducing the Discharge as to the Ballance paid out for Board, Cloathing, &c. It was *Answered* for the Defender, That since the Stock bore no Annualrent, it behoved to be diminished for entertaining the Minor: For altho' the Defunct in his Will, appoints the Rents of his Estate for Years to come to aliment his Children, yet these are not the Subject of a Testamentary Disposition.

Replied for the Pursuer, That by the Current of Decisions, it has been determined, that the Heir is bound to maintain his Brethren and Sisters in case of their having no Fund of their own for their Aliment. As 29th January 1663, Children of *Wetherly* contra the Heir, 11 February 1663, *Frazer* contra *Frazer*, nor is there any thing more conform to Nature and Humanity. So that the Pursuer needed not make any other Use of the Destination in the Testament, then to show the Defunct's *enixa voluntas*, that the Childrens Portions should be paid to them intire at the Terms he had appointed.

Actor Hall and Col-
vil. Alter Smollet and
Bruce.

The Lords found, That the Curators might imploy the Minors Stock in joining with a Person held and repute of Knowledge and Reputation in Trade: But found, that the Stock could not be diminished for the Aliment.
Robertson, Clerk.

DECISION CXI.

[29th June 1715.]

Glasg of Bogany,

AGAINST

The Children of Steuart of Ascog.

THE Laird of *Ardinbo* being Debitor by Bond to *Bogany*, he assigns the Bond to *Ascog*, the last of December 1677. *Ascog* grants Backbond acknowledging the Assignment, but that notwithstanding thereof, *Bogany* might pursue the Intrometters with *Ardinbo's* Moveables, and particularly the Donator to his Escheat, and upon setting Payment of his Proportion of the Moveables, might discharge as much of the Sums assigned as might compence the same, which should be understood to be no contravention of the Warrantice in the Assigna-

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tion : And in respect the Bond was delivered up, *Ascog* obliges himself to make the same forthcoming to *Bogany* upon Demand, for the Ends foresaid ; and faillieing thereof, to hold Compt for the same : *Bogany* thereafter being in Hopes to get Payment, did under form of Instrument in *April* 1678, require *Ascog* to deliver the Bond : Whereupon now *Bogany* intents Process against *Ascogs* Representatives, concluding Payment of the whole Sums in the Bond.

Among other things, it was *Answered* for *Ascog's* Children, That at such a Distance of Time the Instrument founded on, cannot be sustained as probative, unless the Nottar and Witnesses were Alive to support the same : For the Instrument being only *assertio notarii*, it were of dangerous Consequence to sustain it after so long a Time ; and tho' Law gives Faith to the Instruments of Nottars acting in certain Cases, where Law has determined they should be probative, yet that can never be extended to their Actings in such Cases as the present ; for that were to extend their Faith beyond what Law and Practice allows them. Holograph Writs carry a much stronger Proof of their Verity, than Instruments of Nottars, and yet Law has cut them off by 20 Years Prescription, and this Instrument is within a few Years of the long Prescription.

Replied for the Pursuer ; That in some particular Cases our Law gives such Instruments intire Faith, as is observed by the Lord *Stair Lib. 4. Tit. 42. § 9.* Where he takes Notice of the particular Cases in which they are probative of themselves, and brings in the present Case among the rest, in these Words, *In other Cases when Men will not do Acts which they are obliged to do, &c. Instruments taken thereupon by Nottars having Witnesses insert and required, are probative, which no other Witnesses could prove.*

Duplied for the Defenders, That the plain Meaning of the Lord *Stair's* Words is, That these Facts which ordinary Witnesses could not be admitted to prove, may in the Cases mentioned be proven by Instrumentary Witnesses ; which is so far from proving that the bare Assertion of a Nottar is sufficient, that it proves the contrary, *viz.* That tho' these Instruments were recent, they must be supported by the Testimony and not the Subscription of the Witnesses.

Astor Hall. 2
Alter Court. 3

The Lords found, The Instrument not probative of it self, unless it were adminiculat by some Document or other Probation.

Mackenzie, Clerk,

DECISION CXII.

[30th June 1715.]

Isabel Spark,

AGAINST

Barclay of Ury and others.

IN an Action of Exhibition *ad deliberandum* at the Instance of the said *Isabel Spark* against *Ury* and others. The Ordinary having ordained them to exhibite all Writs granted to or by the Pursuers Predecessors, except

cept those on which Infeftment had followed, the Dates of whose Registrations they were ordained to condescend on: The Defenders Reclaimed on these Grounds.

1^{mo}. That as the Priviledge was at first granted for Incouragement of Apparent Heirs; so when they once behave as Heir, (as in the present Case) the Design of the Priviledge ceases, and *sublata Causa tollitur effectus*, and if *Priviledgia* be *strictissime interpretanda* in general, much more here, where the Priviledge is contrary to the common Course of Law, and tends to diminish anothers Right; for in an Exhibition *ad deliberandum*, (contrary to the Nature of all other Exhibitions) without qualifieing that they have any direct Interest, or that they can be in the least benefited thereby; Apparent Heirs may force any Man to open his Charter Chest, and expose his Papers. 2^{do}. The Lord *Stair Lib. 4. Tit. 33. § 7.* Says, That it will be a good Defence in this Action to say, that the Pursuer is already actually Entered and has no Place for Deliberation; but Behaviour is equivalent to actual Entering; and that it excludes the Benefit of Deliberation appears from *Voet: Ad Tit. ff. de jur. delib.* where he says *denegatur tamen ulterior deliberandi facultas, si probari possit heredem jam adivisse, aut pro herede se gessisse, cum non possit desinere esse heres qui semel heres factus est.* 3^{tio}. By our constant Practice, Apparent Heirs can call for no Writs, except those that are in Favours of Persons in the Defuncts own Family (which the Defenders are not in the present Case) as was found 6 December 1661, *Forrester contra Tailfer*; which is yet more fully cleared by a late Decision 10 June 1706. *Buchanans contra Marquis of Montrose*, where after a full Debate, the Lords solemnly decided and declared, that finding that former Decisions had varied in this Point, they resolved to fix such a Rule for the future, as Apparent Heirs might be as little vexatious as was consistent with the legal Priviledges; and therefore found the Marquis not obliged to produce any Writs granted by the Pursuer's Predecessors, to Strangers, or Persons not in *Familia*.

Replied for the Pursuers to the *First* and *Second*, That tho' Behaviour be a passive Title competent to Creditors, yet it is not relevant against this Action; for if it were so, Defenders would alwise propone such Defences, yet 'tis certain they were never sustained, which is expressly said by the Lord *Stair* in the above cited *Tit. § 5.* And the Reason is, That it might be very prejudicial both to the Heir, who could not enter until he had Inspection, and to the Creditors, seeing during a Course of Probation, the Estate would be neglected. And therefore as is observed by the Lord *Stair* in that place, no other passive Title, but being actually entered, is a relevant Defence against this Action: And as to the Authority of *Voet*, It cannot be opposed to what is already mentioned, specially in Point of our Form. Besides, That *Gestio pro herede* by the civil Law, is not only a passive but an active Title, and equivalent to actual Entry; for with them an Heir *adit hereditatem, non solum praferendo, se heredem esse, sed etiam si facto aliquo tandem voluntatem declaraverit.* To the *Third Replied*, That seeing Law gives Apparent Heirs this Benefit, they ought also to have the necessary Means thereof, by Inspection not only of the Benefit, but also of the Burden that may affect their Predecessors Estate, that so they may deliberate; and this End can never be attained, unless all Writs which may infer a liquid Ground of Debt be

produced. And it must be acknowledged that ordinarily the greatest Part of any Mans Debts are owing to Persons out of the Family: Nor can there any Reason be assigned of the Difference, since the Heir if he Enter, will be equally lyable to both Debts *extra* and *intra familiam*. And so the Lords by the Current of Decisions, have sustained this Action against Persons out of the Family, as well those within it.

Actor *Fleeming*. }
Alter *Rot: Gordon*. }

The Lords adhered to the Ordinaries Interlocutor, with this Alteration, that they found the Defenders, tho' not being in Familia defuncti, ought to exhibite all Writs in their Hands; Whether Infeftment has followed thereon or not.

Robertson, Clerk.

DECISION CXIII.

[5th July 1715.]

Cunningham of Enterkin,

AGAINST

William Millar.

THere being a mutual Contract wherein *Enterkin* sets a Tack of a Coal to *Millar*, and the Tack duty regulated by the Number of Coal-hewers, that should be imployed by the Tacksman, *viz.* if Six were imployed, then 600 Merks to be the Tack-duty: But if more or less than Six, then 100 Merks for each was to be added or deduced. And *Enterkin* having charged on this, the Question at discussing turned on this single Point, *viz.* Whether by this Tack the Tacksman is lyable for 600 Merks of yearly Duty; tho' he imployed no Coal-hewers at all? And it was,

Alledged for the Charger, That as the Suspender could not deny but he was obliged to work, since he had taken a Tack of the Coal, so also by the Nature of the Tack, having stipulated the Liberty to work with Six Coal-hewers; *Enterkin* could have obliged him to imploy these in the Work; for Contracts of this kind are mutual, and so as *Enterkin* was obliged to allow him Six Coal-hewers, he also must be understood obliged to keep them at the Work, if the Coal-wall would serve; otherwise he might have made the Tack wholly Elusory, even suppose he had gotten a sufficient Coal-work: And therefore this being the Rule and Standard which both Parties fix upon, tho' with a Liberty to the Tacksman to imploy more as he thought fit, but with no Freedom to keep under that Number 6, in the Event that's happened, that must be the stated Number, as being what the Tacksman himself expressly stipulated Liberty for, and for which he is obliged to pay the Setter. Let the Case be, a Master setting a piece of Ground with Liberty to sow Six Bolls of Corn; and the Decision will be very plainly in the Master's Favours; tho' the Tenent never sow any: Now the Case is the same here, for the Coal would have afforded as certain a Product as the Ground.

An-

Answered for the Suspender, That by the Contract he is not bound to imploy Six Coal-hewers, and consequently not to pay 600 Merks of Duty; but that by the Contract he might have imployed one or two Coal-hewers, and then paid only 100 or 200 Merks, and having imployed none at all, he could not be lyable in more Rent, than if he had.

Replied for the Charger, That 'tis by the Suspender's Fault that they did not work, since he never opened the Ground; and as *qui dolo desit possidere pro possessore habetur*: So since by the Suspender's Fault the Coal-hewers were not imployed, in so far as concerns the Suspender, they must be held as Workers.

Duplied for the Suspender, That by the Tack there was an expresse Provision, That in case the Tackf-man should instruct by the Coal-hewers and Overfmen their Oaths, and producing of the Compt-books, that there were not the full Number of Six working; As also, the Time of any Coal-hewers Absence, that he shall be only bound to pay proportionally to the Coal-hewers that worked; which imports a Power to Work with as many or as few as he thought fit, and so the Number cannot be liquidate to Six. And tho' the Servants and Books, &c. are agreed upon as a sufficient Evidence of the Deficiency of the Number, yet the Tackfman is not thereby precluded from other Means of Probation of this Point.

Triplied for the Charger, That this Exception confirms the Rule, that the Suspender was expressly obliged to work with Six; for the Provision imports an Exception, and an Exception implies a preceeding Rule: And as the Rule is hereby established, so the Suspender is not in the Terms of the Exception, which only concerns the Case where the Coal was working, an Overfman imployed, a Compt-Book kept, &c. which is the particular Manner of Probation fixed upon. But the Suspender cannot subsume upon any such Probation, nor does it in the least concern the Case: For here the Suspender has wrought none, and the Provision is upon Supposition of his working, which cannot be applied to the Event, that by his Fault has fallen out.

As for Boswel. }
Alter Hay. }

The Lords found the Letters orderly proceeded.
Gibson, Clerk.

DECISION CXIV.

[6th July 1715.]

The Lady Auchinvole and her Daughter,

AGAINST

Her Step-Daughter.

IN the Competition betwixt these Parties in the Ranking of *Auchinvole* his Creditors, for Preference upon his Estate, for the several Provisions contained in his First and Second Contracts of Marriage; The Lords gave a Decision on the 12th November last, which stands marked in that Sessions Decisions: But there being also in that Interlocutor a Remit to the Ordinary to hear Parties, how far the Provisions to the

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Daughter of the Second Marriage could burden the Heir of the First, or if the Provisions in favours of the Heirs of the First and Second Marriage ought equally and proportionally to affect, and be paid out of the Defunct's Estate. At Reporting—

It was *Alledged* for the Relict, That she having brought 15000 Merks of Tocher, and the Husband having contracted 5000 more, and she provided to the Liferent of the whole, she ought to be preferred for the same, she being with respect to it an onerous Creditor, and therefore preferable to the Daughter of the First Marriage, who is Heir of Provision to her Father; especially since the Husband had *de facto* received her Tocher, as appeared by a Declaration under his Hand, that he had got Payment. And for the same Reason she contended, that she as Mother and Assigney by the Daughter of the Second Marriage, might be preferred for the Fee of the 20000 Merks, at least, ought to come in *pari passu* with the Daughter of the First Marriage.

Answered for the Heir of Provision, That she did not dispute the Relict's Preference as to her Liferent, but denies that by her Contract of Marriage, her Husband is obliged for the Liferent of the 20000 Merks, but only for 5000. And as to the 15000, *viz.* her own Portion, the Husband was never Debitor in the Liferent of it, unless he had uplifted the Money, which does not appear; for as to the abovementioned Declaration, it being a voluntary Deed of the Husband in Favours of his Wife, and impetrate without any just and real Cause, it can never be probative against the Daughter of the First Marriage, an anterior lawful Creditor by the Provisions of her Father's and Mother's first Contract of Marriage. And therefore neither was the Defunct so much as Debitor in the Provision to the Child of the Second Marriage farther than the 5000 Merks which he contracted. For the 15000 was heretably secured on the Estate of *Erskine*, and no Instruction, as said is, that it was uplifted by the Defunct: And therefore the utmost that can be pretended for the Daughter of the second Marriage, is to come in equally and proportionally with the Daughter of the First for 5000. Nay, tho' it could be proven that the 15000 Merks was uplifted by the Defunct, yet the Daughter of the second Marriage could plead no Preference to the Provisions of the Daughters of the First: But on the contrary, the Preference is to the first Contract; For albeit such Contracts do not preclude a Man from doing rational Deeds, and that a second Contract is a rational Deed, yet the Reasonableness of the Provisions is not to be considered with respect to the Tocher that comes by the second Wife, when the Question is betwixt the Heirs of the second and first Marriage; but with respect to the Father's Estate towards the fulfilling the first Provisions; For otherwise there could be no Security by a first Contract of Marriage, when the Parties could not possibly know what Provisions the Husband might make in another Marriage.

Replied for the Relict and her Daughter, That the Declaration abovementioned, was a sufficient Instruction that the Husband had received the Portion: And so the Lords found in another Branch of the same Ranking, betwixt the Laird of *Ferguslee* and the Relict; wherein also he made the same Exception, and was overruled by the Lords upon this Reason, *That the Husband having got the Bonds into his Hands, and they*

now nowhere appearing, and having given a Declaration that he got Payment, it was a sufficient Exoneration and Instruction of Payment even to the Debitor. And as to what was pled against the Daughter of the second Marriage her Preference, Replied, That notwithstanding of Provisions in Favours of the Children by the first Contract, the Father may (as was owned by the other Side) do rational Deeds, even in Prejudice of the Childrens Provisions by that first Contract. Now, there could not be a more rational nay onerous Deed, than when he got 15000 Merks of Portion with a Lady, to provide 5000 of his own to be added thereto for a Provision to the Children of the Marriage. And this was rational even as to the Children of the first Marriage, who had a fair Hazard to succeed to the whole 15000 Merks, the Sum being provided to his Heirs whatsoever, failing Heirs of the Marriage.

Boswel for the
Lady. Alter Sir
John Ferguson.

The Lords preferred the Lady for her Liferent, and found the Daughters came in *pari passu* proportionally, effeiving to their respective Sums.

Gibson, Clerk.

DECISION CXV.

[12th July 1715.]

Cunningham of Brownhill,

AGAINST

Dame Margaret Ramsay his Step-Grand-Mother.

THE said William Cunningham a Pupil, having raised a Process of Aliment against his Mother and Step Grand-Mother, upon the Act of Parliament 1491, Cap. 25. whereby Superiors of Ward-Lands are obliged to Aliment the Heirs, which by established Practice *paritate rationis*, is extended to Liferenters; amongst other Defences for the Step-Grand-Mother this was proponed, That when she married the Pursuer's Grand-Father, she was provided in a Liferent of 3000 Merks out of a former Husband's Estate, the Half whereof she allowed to be sold, and applied for Payment of *Brownhill* her Husband's Debts: And therefore had scarce enough to her self, having also several Children and Grand-Children of her own. Whereas in all Modifications of Aliment, the Lords do always consider the Quantity of the Liferent, the Quality and Circumstances of the Liferentrix, &c.

Answered for the Pursuer, That whatever Tocher or Provision she brought makes no Difference here; because still the Heir, at least under Pupillarity, must be Alimented, which is *Provisio Legis*, and by no Paction can be evacuated: And as the Law did openly intimate to her this as a Burden, which she was in Hazard to undergo, she ought to have provided for his Liferent suitably. For the Rule is, That whatever Portion of Burden each Liferenter have from the Fiar's Estate, and whatever

the Portions were that they brought, yet that since he finds them Life-renters, they must contribute to his Maintenance.

The Lords found the Defence not relevant to assoillie the Step-Grand-Mother, from contributing a Proportion of the Pursuer's Aliment.

Aſtor Boſwel. Alt. }
Sir Thomas Wallace.

Roberton, Clerk.

DECISION CXVI.

[13th July 1715.]

John Douglass,

AGAINST

Cochran of Ochiltrie.

SIR John Cochran having been pursued by John Douglass, for a Taylor Accompt due to William Douglass his Father, (from whom he had a general Disposition to his Compt-book) and having referred the same to Sir John's Oath, the Term was Circumduced against him, and Decreet Extracted, without the Pursuer's confirming the Debt: Sir John having Suspended, and deceased before Discussing, the Pursuer insists in a Process upon the passive Titles against Ochiltrie, as Representing his Father. And the Question being, *Whether the Decreet above-mentioned was Valid, the Pursuer's Title being only a General Assignation, and he never having Confirmed the Debt?*

It was *Alleged* for the Defender, That the Decreet was Null, the Pursuer's Title being only a General Assignation, which was no compleat Title, and so could be no Warrant for a Decreet; being at most but like a Decreet dative and a Licence, which could never support a Decreet, unless Confirmation had followed before Extract.

Answered for the Pursuer, *imo*. That the Decreet was still good, the Pursuer's Assignation being a sufficient Title *ad fundandam litem*; so that the Pursuer was at most obliged only to Confirm before Extract: And it was the Part of Sir John's Procurators, before taking a Day, to have objected this. *2do*. The General Assignation, as it gives *Jus prosequendi*, so does it *Jus exigendi* of all the Accompts in his Book. *3tio*. There is more in a general Assignation, than in a Licence to pursue: For a general Assignney may intromet without Hazard of a Vicious Intromission, which a Person having only a Licence would not do; so that the Defender having suffered himself to be Decerned, all he can contend for, after Extracting, is at most, That the Assignney be obliged to Confirm, without opening the Decreet: And this conform to the 18th Article of the Regulations 1695, whereby Decreets *in foro* are not to be reduced upon Nullities, further than to Redress the Party's Prejudice by that Nullity; but the rest of the Interlocutors in the Decreet quarrelled, are to stand *tanquam res hactenus judicata*.

Replied for the Defender, *imo*. That the Defence being a Nullity in the Pursuer's Title appearing from the Decreet, the Allegdgence of Competent

ent and Omitted cannot be sustained to support it ; for till the Title in the Pursuer's Person be complete, it cannot be understood a *Res judicata*, because he is not a lawful Contradictor, and so cannot plead the Benefit of a *Res judicata* in that Subject. 2do. As to Confirming before Extract, *Replied*, That he cannot *cum effectu* : For tho' such a Confirmation might be drawn back to the Time of the Sentence, if both Parties were alive, yet Sir John dying before Confirmation, it was *Medium impedimentum* that hindered the Confirmation to Validate the prior Sentence ; which being in it self Null till Confirmation, it was never in Sir John's Lifetime an effectual Sentence, and he was held as confest at the Instance of a Party who had no Right.

Further *Alledged* for the Pursuer, That it is not altogether clear that an Assignment to a Compt-book needs Confirmation : For tho' there be many Accompts in it, which makes the Assignment a kind of General One ; yet the Book it self is one complete Subject : And tho' many Persons be concerned in the several Accompts, yet the Book may be considered as *unum Nomen* ; just as when a Man assigns an Accompt consisting of many Articles, or a Flock of Sheep ; in neither of which Cases is Confirmation needful, since tho' there may be many Heads, yet there is but one Subject.

Answered for the Defender, That a special Right behooved to condescend upon the Debitor and the Subject received ; for otherwise by the same Rule, an Assignment to all Debts might be interpreted a special Assignment.

Replied for the Pursuer, That the present Case differs from that, where several Bonds are assigned, since each Bond is a *distinctum Nomen* and *Species*.

Advoc. Col. Mackenzie.
Alter Cochran.

} The Lords sustained the Pursuer's Title, he Confirming before Extract.

Gibson, Clerk.

DECISION CXVII.

[14th July 1715.]

Murray of Mount-Lothian,

AGAINST

Deacon Brownhill.

There having past a Decision in this Case the 24th of June last, which is already marked, the State of the Question may be there found ; but there was a Reclaiming Petition given in by Deacon Brownhill against that Interlocutor, where he further *Alledged*,

That in this Case there is no *Servitus oneris ferendi*, but that of *Tigni immittendi*, which is quite another Thing, and of a different Nature and Effects in Law : For here the Servient Tenement has not the Dominant built above it, nor is it liable to bear the Weight thereof, but only to receive its Joists into the Gavel, or the Chimneys leaned thereto, which is precisely *Servitus tigni immittendi*. And if so, then the Master of the

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the Portions were that they brought, yet that since he finds them Life-renters, they must contribute to his Maintenance.

Aſtor Boſwel. Alt. }
Sir Thomas Wallace. }

The Lords found the Defence not relevant to aſſoillie the Step-Grand-Mother, from contributing a Proportion of the Purſuer's Aliment.

Roberton, Clerk.

DECISION CXVI.

[13th July 1715.]

John Douglaſs,

AGAINST

Cochran of Ochiltrie.

SIR John Cochran having been purſued by John Douglaſs, for a Taylor Accompt due to William Douglaſs his Father, (from whom he had a general Diſpoſition to his Compt-book) and having referred the ſame to Sir John's Oath, the Term was Circumduced againſt him, and Decreet Extracted, without the Purſuer's confirming the Debt: Sir John having Suspended, and deceased before Diſcuſſing, the Purſuer inſiſts in a Proceſs upon the paſſive Titles againſt Ochiltrie, as Reſeſenting his Father. And the Queſtion being, *Whether the Decreet above-mentioned was Valid, the Purſuer's Title being only a General Aſſignation, and he never having Confirmed the Debt?*

It was *Alleged* for the Defender, That the Decreet was Null, the Purſuer's Title being only a General Aſſignation, which was no compleat Title, and ſo could be no Warrant for a Decreet; being at moſt but like a Decreet dative and a Licence, which could never ſupport a Decreet, unleſs Confirmation had followed before Extract.

Answered for the Purſuer, 1mo. That the Decreet was ſtill good, the Purſuer's Aſſignation being a ſufficient Title *ad fundandam litem*; ſo that the Purſuer was at moſt obliged only to Confirm before Extract: And it was the Part of Sir John's Procurators, before taking a Day, to have objected this. 2do. The General Aſſignation, as it gives *Jus proſequendi*, ſo does it *Jus exigendi* of all the Accompts in his Book. 3tio. There is more in a general Aſſignation, than in a Licence to purſue: For a general Aſſigney may intromet without Hazard of a Vitious Intromiſſion, which a Perſon having only a Licence would not do; ſo that the Defender having ſuffered himſelf to be Decerned, all he can contend for, after Extracting, is at moſt, That the Aſſigney be obliged to Confirm, without opening the Decreet: And this conform to the 18th Article of the Regulations 1695, whereby Decreets *in foro* are not to be reduced upon Nullities, further than to Redreſs the Party's Prejudice by that Nullity; but the reſt of the Interlocutors in the Decreet quarrelled, are to ſtand *tanquam res haſtenus judicatae*.

Replied for the Defender, 1mo. That the Defence being a Nullity in the Purſuer's Title appearing from the Decreet, the Allegance of *Competent*.

sent and Omitted cannot be sustained to support it ; for till the Title in the Pursuer's Person be complete, it cannot be understood a *Res judicata*, because he is not a lawful Contradictor, and so cannot plead the Benefit of a *Res judicata* in that Subject. 2do. As to Confirming before Extract, Replied, That he cannot *cum effectu* : For tho' such a Confirmation might be drawn back to the Time of the Sentence, if both Parties were alive, yet Sir John dying before Confirmation, it was *Medium impedimentum* that hindered the Confirmation to Validate the prior Sentence ; which being in it self Null till Confirmation, it was never in Sir John's Lifetime an effectual Sentence, and he was held as confest at the Instance of a Party who had no Right.

Further *Alledged* for the Pursuer, That it is not altogether clear that an Assignment to a Compt-book needs Confirmation : For tho' there be many Accompts in it, which makes the Assignment a kind of General One; yet the Book it self is one complete Subject : And tho' many Persons be concerned in the several Accompts, yet the Book may be considered as *unum Nomen* ; just as when a Man assigns an Accompt consisting of many Articles, or a Flock of Sheep ; in neither of which Cases is Confirmation needful, since tho' there may be many Heads, yet there is but one Subject.

Answered for the Defender, That a special Right behooved to condescend upon the Debitor and the Subject received ; for otherwise by the same Rule, an Assignment to all Debts might be interpreted a special Assignment.

Replied for the Pursuer, That the present Case differs from that, where several Bonds are assigned, since each Bond is a *distinctum Nomen* and *Species*.

Astor Col. Mackenzie. } The Lords sustained the Pursuer's Title, he Confirming
Alter Cochran. } before Extract.

Gibson, Clerk.

DECISION CXVII.

[14th July 1715.]

Murray of Mount-Lothian,

AGAINST

Deacon Brownhill.

Here having past a Decision in this Case the 24th of June last, which is already marked, the State of the Question may be there found ; but there was a Reclaiming Petition given in by Deacon Brownhill against that Interlocutor, where he further *Alledged*,

That in this Case there is no *Servitus oneris ferendi*, but that of *Tigni immittendi*, which is quite another Thing, and of a different Nature and Effects in Law : For here the Servient Tenement has not the Dominant built above it, nor is it liable to bear the Weight thereof, but only to receive its Joists into the Gavel, or the Chimneys leaned thereto, which is precisely *Servitus tigni immittendi*. And if so, then the Master of the

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Servient Tenement cannot be forced to Repair the Gavel, far less to Rebuild the Chimnies: As is plain from L. 8. §. 2. ff. *Si Servit. Vindic.* Which says, *Distant autem hæ actiones inter Se (i. e. Actiones oneris ferendi et Tigni immitendi) quod Superior quidem locum habet etiam ad compellendum vicinum reficere parietem meum, hæc vero locum habet ad hoc solum ut Tigna suscipiat, quod non est contra genera Servitutum.* The Gloss upon that Text likewise plainly says, *That Servitutes Tigni immitendi et oneris ferendi differunt, priore casu qui Servitutem debet, pati tantum Tignum immiti cogitur; Posteriore vero, non tantum pati onus sed et reficere parietem cui onus imponam.* And Lauterbach on the Text says, *Dominus enim Servientis in hac Servitute, parietem reficere non tenetur.*

Answered for Mount-Lothian, imò. That however the Romans made such a Distinction (not so much Materially as in Name) from the different kinds of Pressure, that was to be supported; yet really we have not so much that Distinction, for all with us goes under the Name of the Servitude of Support which may be either of a Wall, Joist, or Dormant, as is plain from the Lord Stair §. 6. *Tit. Real Servitudes P. 284.* and in Tenements within Burgh, where the *Tignum immissum* tends to the support of the *Edifice* there is no Difference, and perhaps that of *Tigni immittendi*, which was thus differenced by the Romans, was properly in these Cases, where the Use was not so much the support of an *Edifice*, as for other Conveniencies. But where the *Immissum* comes to be in place of the Gavel of the House (as in this Case it is) there is no Rational Distinction, whether the *Immissum* or Support be the resting of a Wall, or the resting of a Dormant; So that this is not *tignum immissum*, which was for a particular Conveniency, as the Law Expresses, *facere porticum Ambulatorium. L. 8. §. 1. ff. Si Servit. Vind.* Something like our Balconies, and to hang Things upon, or lay something over to protect against the Weather. But this is really the *Servitus oneris ferendi*, which becomes in a manner in place of a common Gavel to both Houses, and is the same as if in place of the Dormants, there had been a Superstructure of Wall. 2^{do}. *Esto*, this were *tigni immittendi* only; yet there is a great difference betwixt an Action intended by the Dominant Owner against the Servient, to Repair (*V. G.* the under Support is like to fail, and therefore the Superior Pursues the Inferior to Repair, which by the Law of *oneris ferendi* he was obliged to upon his own Charge, or else Derelinguish the Right, L. 6. §. 2. ff. *Si Servit. Vind.*) and a Claim only, when the Servient has for his Conveniency taken down his Wall, and is Rebuilding. In the first there may be a Distinction betwixt *oneris ferendi*, and *tigni immittendi*, but in the last there is none; nor is there any Distinction here, whether this is done out of meer Pleasure, or for necessary Refection; seeing the Dominant Owner is in both Cases as it were upon the Defensive; whereas if the other were not stirring his Wall, and the Dominant Pursuing, the Case might be different; and as to the Too-fal Chimnies, they are plainly *oneris ferendi*, and therefore have the Claim that the other should Repair more forcibly on all the Arguments before adduced, L. 5. *C. de. Servit. et. Aq.*

Replied for Brownhill, That supposing they were in the Case of a Servitude *oneris ferendi*, tho' he might be bound to Repair his own Gavel, yet

yet he would not be obliged to Support or Rebuild any part of the Dominant Tenement. The forecited L. 8. pr. is exprefs in this, *Sicut autem refectio parietis ad vicinum pertinet, ita futura edificiorum vicini cui servitus Debetur, quamdiu paries reficietur, ad inferiorem Vicinum non debet pertinere, nam si non vult Superior fulcire, deponat et restituat, cum paries fuerit restitutus; et hic quoque sicut in cæteris Servitutibus, actio contraria dabitur, hoc est, jus tibi non esse me cogere:* And the Gloss and likewise the forecited Author are as exprefs on this as on the other Head, *Refectionis onus Servienti, futura Dominanti incumbit, hoc est locum Servientem reficere debet, non Dominantem.*

Duplied for Mount-Lothean, That the true Distinction is betwixt a *Futura* the Time the Servient is Repairing, by a Suit at the Instance of the Dominant, and the *Futura* that is occasioned by the Servient's Voluntarily taking down his own Wall, and Repairing for his own Conveniency, which is the present Case.

Triplied for Brownhill, That there is a difference betwixt the Case, where the Servitude is Constitute by Exprefs Consent, and that where it is Constitute by long Possession only, which is the present Case. In the first, The Master of the Servient Tenement is bound to Repair, not indeed the Dominant, but only his own Tenement, so as to make it Capable to bear the Weight; But in the other Case, he is not bound to Repair at all. For L. 33. ff. de Serv. Præd. urb. Lays down the Rule, That in the Servitude *oneris ferendi*, the Proprietar of the Servient Tenement must Repair. And the Gloss States this Exception, *aliter est cum quis ex vetustate sibi asserit Servitutem, tunc enim Adversarius non restituet;* And this is also the Opinion of the Lord Stair §. 6. Tit. *Servitudes Real*, where he takes Notice of the above Distinction.

Quadruplied for Mount-Lothian, 1mo. That in general Prescription is Equivalent to Paction. 2do. That all Brownhill's Argument fail in this, that he Applies the Rules of the Case, where the Dominant is pursuing the Servient for Reparation, to the Case where the Dominant is doing nothing, but the Servient is taking down that which should Support the other's Fabrick, for his Conveniency: And as he cannot by his Deed put his Neighbour in a worse Case; so, in many Instances, Law favours that which is reckoned Defence, and to preserve the Right, where it would not give the same Favour, where it turns to an Action.

The Lords adhered to their former Deliverance, unless Brownhill would Alledge and Instruct, that the Gavel was Ruinous, and the taking down thereof Necessary. In which Case they found, That Brownhill was bound to the Expences of taking down the Gavel and Chimneys; yet that he would not be bound to put up the Too-fall Chimneys at his Expence.

Robert Dundas for
Brownhill. Alt. Sir
Walter Pringle.

Mackenzie, Clerk.

D E C I S I O N CXVIII.

[14th July 1715.]

David Burgh of Fimmouth,

A G A I N S T

Forbes of Ballogie.

SIR *David Thoirs* having Acquired the Lands of *Wester-Lochgellie*, from *William Malcolm*; he without being Infest, Assigns the same to Sir *Robert Forbes*, who granted Backbond, Acknowledging he had paid no Price, but that the Right was granted to him, in Order that he might Sell the Lands for Relieving himself of what Debts he had paid for Sir *David*, or should thereafter pay; and therefore obliged himself, that being so Relieved, he should be Comptable, and apply the Ballance to Sir *David* his Heirs, &c. And the Backbond bears also, That Sir *Robert* should Sell with Consent of Sir *David* or *William Thoirs* his Nephew. *David Burgh* being Creditor to Sir *David*, Constituted the same by a Decreet against his Heir, and thereupon Adjudged the Lands and the foresaid Backbond, Sir *Robert* made over his Right to Mr. *Henry Scrimzour*, who obtained himself Infest; and there being a part of the Price yet in his Hands, there falls out a Competition about it, betwixt *Burgh* as Creditor to Sir *David*, and *Ballogie* as Creditor to Sir *Robert*, who as such had Arrested in Mr. *Scrimzour's* Hands.

And it was Alledged for *Ballogie*, That in a former Debate betwixt Mr. *Henry Scrimzour* and *David Burgh*, wherein *David* had alledged, the Backbond granted by Sir *Robert* to Sir *David*, did Intrinsically Affect Sir *Robert's* Right, That Mr. *Scrimzour* could not acquire any Right, but with the Burden of his Author's Backbond; yet the Lords preferred Mr. *Scrimzour*, and therefore Sir *Robert's* Creditor Arresting in Mr. *Scrimzour's* Hands is preferable for the Price due to Sir *Robert*, which could not be Affected by his Backbond, but Sir *David's* Creditor must insist for Implement thereof against Sir *Robert* as accords.

Answered for *David Burgh*, That tho' Mr. *Scrimzour* was preferred, yet there was not the same Reason for preferring Sir *Robert's* Creditor; For the Reason of Mr. *Scrimzour's* Preference, was his being Purchasser *bona fide* from Sir *Robert*, and had Compleated his Right by Charter, &c. so that the Backbond could not Affect him: But Sir *Robert's* Creditor who had only Arrested the Subject, can never be in better Case than himself, who by his Backbond, was to apply the Superplus to Sir *David*. The Reason is, That it's hard to Tie Purchassers who pay an adequate Price, by Backbonds that may be Latent: But Arresters and Adjudgers, only Affect the Subject as their Debtor has it in his Person, with its Qualities; and therefore can never be in a better Case than he himself. And this was so Decided 5th February 1678, *Mackenzie contra Watson* and *Stuart*, which was indeed a Case of Bonds for Debt, but the Reason of the Decision hold likewise here. But there was a Decision *in terminis* 22d December 1680 *Prince contra Pallat*, which was under the Lords Consideration, when very lately they Decided in the same Manner,
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viz. 18th January and 4th February 1715, Simson's Creditors contra Maxwell.

Replied for Ballogie, That this was not a Backbond of Trust, but an Obligation upon Sir Robert to pay the Superplus Price, just as if Sir Robert had given a Bond to Sir David for the Price.

Duplied for Burgh, That the Backbond is granted of the Date of the Disposition, and Sir Robert bound to Sell the Lands, and apply the Superplus to Sir David; Now he does Sell to Mr. Scimzour, and lying under an Obligation to make the Price Furthcoming to Sir David, 'tis impossible Sir Robert's Creditors could Affect this Price to Sir David's Prejudice; for whatever Objection Meets Sir Robert, must Meet his Creditors Arresters.

The Lords found, That Sir Robert Forbes was Trustee to Sir David Thoirs by his Backbond, in so far as concerned the Superplus Price of the Lands Disposed, over and above the Payment and Relief of Debts and Engagements, wherein Sir Robert was concerned with Sir David, and therefore found Finmonth ought to be preferred to Ballogie as Arrester.

Mackenzie, Clerk.

DECISION CXIX.

[15th July 1715.]

Mistress Margaret Schaw, Daughter to the Deceast Sir John Schaw of Greenock, and John Houston Younger of that Ilk her Husband for his Interest,

AGAINST

Sir John Schaw of Greenock her Brother.

THE Deceast Sir John Schaw of Greenock, Father to the present Sir John, had put his Son in Fee of the Lands and Barony of Greenock, by Charter and Infestment following thereupon in Anno 1686. And in 1700, in a Contract of Marriage betwixt this Sir John and his present Lady, both Father and Son for their several Rights to their saids Lands, make a Tailzie of the Estate in Favours of the said Sir John Younger, and the Heirs Male of his Body, which failzieing, to his Younger Brothers *Nominatim* then Alive *Successive*, and the Heirs Male of their Bodies: Which failzieing, to the other Heirs Male of the said Sir John the Father's Body: Which failzieing, to the said Mrs. Margaret Schaw, *Nominatim*, and that under Prohibitory and Irritant Clauses, *de non alienando et non contrahendo Debitum*, but with this Exception that it should be Leisum and Lawful to the Father and the Son jointly to alter the Succession.

Sir John's whole Younger Brothers being Deceast without Issue of their Bodies: The said Mrs. Margaret Schaw as standing next in the Tailzie, Pursued an Exhibition of the Contract, that it might be Recorded

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ded in the Books of Session for Preservation. " And accordingly the " Lords ordained the Principal Contract to be Exhibite by their Interlocutor on the 25th Day of January last, but reserving all Defences against " Registration, or to any other legal Effect as Accords. Which Decision stands Marked in the Collection of that Session ; In Obedience thereto, Sir John did Exhibite one of the Principal Sides of the Contract, whereupon he was allowed to Repeat his Defences against the Registration of the said Principal, which he did by Repeating an Execute Summonds of Declarator at his Instance, Concluding, That he by the Charter in anno 1686, being the Original and Unlimited Fiar, and Maker of the Tailzie, the foresaid Contract could not Qualifie the Fee of the said Estate in his Person, and therefore that he had Right to alter the Succession at his Pleasure, and that the Pursuer had no manner of Interest to call for Exhibition, far less to oblige him to Registrate the Contract.

And here it was *Alledged* for Sir John, That this Contract not being compleated by Charter and Safine, and still but in the Terms of a personal Obligement, was not to be reckoned a delivered Evident *quoad* the Pursuer Mrs. Houston ; because, that tho' a Contract of Marriage be onerous *quoad* the Interest of the Contracters, yet it is most gratuitous in as far as concerns the Substitute-Heirs not descended of the Marriage. And as *Dirlton* says, Page 86. and Sir James Stewart in his Notes on him, P. 145. *Heirs of the Marriage are in Obligations, but the Substitutes in Destination only* ; so that here there is indeed no Question about Delivery, in so far as concerns the Wife and Children of the Marriage: But as to the Pursuer and all others, the Contract is to be held undelivered; since in mutual Contracts the principal Parties may cancel the Writ at their Pleasure as to Third Parties concerned. *2do*. As to its being Registrate in the Record of Taillies, tho' this has Effect against Creditors, in the Case of Infeftment following on it ; yet the Registration of a Bond of Taillie, which in it self is incompleat, imports nothing as to the Delivery, because the Principal is given back to the Presenter. Besides, that the Registration of a Bond of Taillie seems to require a written Procuratory, (it being a great Restriction upon Property) which this has not, but only bears a Bill prefix'd and signed by an Advocate ; but nothing ever followed upon this Taillie, either by Resignation, Infeftment, or Possession, either in the Father's Lifetime or since : Nor was there ever any Deed of Homologation to validate the Registration.

Answered for the Pursuer, That the Contract is mutual, whereof there are two Doubles signed and interchanged, the most effectual Delivery that can be of any Evident. And when this is done, there is no *locus penitentiae* to refile or retire the Writ ; yea the Marriage follow'd in Implement : So that tho' it had not been Recorded in the Register of Taillies, it was a delivered Evident, and differs far from a Bond of Taillie granted only by one Person lying by him, or in that Manner that he could easily with Consent of another Person retire and destroy it : Which indeed was the Case of *Lindoirs* and *Innernity*. Nor in this Point can the Distinction hold betwixt that Part of the Contract that concerned the Prestations regarding the Marriage, and other Parts of it : Because, as to Delivery, and being out of the Granter's Power to retire, it is *unicum Instrumentum indivisibile*, and could not be a delivered Evident in Part,
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and in Part not. The Act of Delivery is *Facti*, and so indivisible in its Nature, the Interchanging of a mutual Contract must make it a delivered Evident as to all its Contents. And as to the Citation from *Dirlton*, it does not concern the present Question; for his Position only takes Place in Contracts of Marriage, bearing only a simple Obligation without Irritances; but wherever these occur, the whole Persons substitute are in Obligation, as well as the Marriage. And as to the Recording in the Taillie Register, it is sufficient that it was done upon a Supplication given in, in Name both of the Father and Son, and subscribed by an Advocate: But be it as it will, it is enough for the Pursuer's Purpose, That, *1mo*. It is Registrare by Order of the Lords. *2do*. That the Act of Parliament requires no special Warrant from Parties. *3tio*. There is no Part of Jurisdiction here, it being Recorded not for Execution, but *ad futuram rei memoriam*; so that this being a Register of Probative Writs, there seems no special Mandat requisite, more than for putting Writs in the other Register of probative Writs. *4to*. It was given in to the proper Officer, the Clerk of that Register.

It was further urged for the Defender, That granting it to have been delivered Evident, yet no Prohibitory or Irritant Clauses in the Contract can qualify the Defender's Fee; which was established in his Person before the Contract, or afford any Title to the Pursuer to crave Registration; since the Defender is the maker of the Taillie, and so can unmake it at his Pleasuer. Because *1mo*. The Defender being in the Fee, the Power of Disposal follows *ex jure dominii*, whereby *unusquisque est rei sue Moderator & arbiter* which is the Character of Property. For tho' the Right of an Heir of Taillie which is qualified, and *sub modo*, may in certain Events resolve; yet the Defender's Fee being originally simple and unlimited, it cannot be subject to any Limitation in his Person, more especially by a personal Right not compleated by Charter and Sasine. *2do*. This Effect of Property is *juris publici cui pactis privatorum non derogatur*. No Body can assume to himself the State of a Minor a Prodigal, or furious Person, for whom the Law has provided special Privileges; and the Methods of restraining and inlargeing such Persons are settled by Law, and peculiar Forms and Methods introduced for both, which must be punctually observed. Why all these Niceties in Law to disable a Person to dispose on his Property, if a simple Bond were of it self sufficient? *3tio*. A Bond of Taillie cannot derogate from the Power of Disposal in the Maker, because, it obliges him to resigne in Favours of himself and his Heirs of Taillie, and therefore *quoad* himself he his both Debitor and Creditor in the whole Obligements in the Bond; which Obligations as to him are Null. *4to*. Neither is the Taillie more Obligatory upon the Maker, in Favours of the Heirs of Taillie, because he is the first Fiar himself, and their Succession depends on him, whom they must represent and fulfil his Deeds, and are not his Creditors, but his Creatures, and are to receive the Succession qualified as he gives it. *5to*. The Act of Parliament 1685, provides only to secure the Succession against Deeds of Heirs of Entail, but leaves the Case of the Maker of the Taillie absolutely free; because the Taillie is made in his Favours for preservation of his Family, and *cui libet licet juri pro se introducto renunciare*. 6. The Taillie of *Harden* was determined in much a straiter Case than the

Defenders. For it was registrate by an expresse written Warrant, and Inhibition raised on it; yea, by the first Taillie, Sir *William* the Son being the Fiar, was obliged to resigne in Favours of himself in Liferent, and his Father in Fee, with prohibitory and Irritant Clauses upon both; yet because the Father was the first Fiar, and so the Irritancies could not take Place in him: Therefore the Lords found the Second Taillie made by the Son with his Consent, was good.

Answered for the Pursuer, That this being a compleated Contract, and having the Force of a delivered Evident, there was no Distinction as to the Granter, whether the same was compleated by Charter and Sasine, seeing the Power to alter did not lye in this, that it was still but a personal Obligement, but that it arose from the Nature of the thing. For whatever the Charter and Sasine could do, the personal Obligement not to alter, had the same Effect against the Granter, to oblige him to fulfil; since in both Cases the Granter is still Fiar, and therefore may still dispose, unless otherwise bound up: So that the Point does not lye in this. And therefore, *2do*. Only let it be supposed (which is already proven) that the Evident was delivered or holden as such; and then whether it was compleated by Charter and Sasine or not, there can no Reason be given why one may not tie up himself in relation to Succession, as well as voluntarily take himself to a Liferent; for *ex eo quod unusquisque, est rei suae Moderator & arbiter*, it follows that he may dispose on his Property as he pleases, and tie up himself in relation to it, even *ex causa lucrativa*. This is the Foundation upon which all Donations are grounded, these at first being free & *voluntatis*, but afterwards upon the intervention of legal and effectual Rights, they become *necessitatis*, and infer a Tie unalterable. Thus in the common Law § 3. *Inst. de donat.* It is exprest in as many words: Nor was it ever heard with us, that a free Donation could be altered by a Second; Nor as to these is there any Difference here, whether they be *pure*, or only to take Effect *post Tempus*, or *conditionally*, which is the present Case; and to this prerogative of Property pled by the Defender, may very well be opposed a much more sacred Rule in *L. 1. ff. de pact. Nihil tam congruum fidei humanae, quamque placuerunt servari*; and as the Roman Nicities about *pacta de hereditate viventis*, and *Pacta nuda* were never received with us: So there is nothing to hinder a Paction whereby a Man ties up himself not to alter a Succession, from being binding even according to the common Law, *L. 35. § 5. C. de Donat.* To which agrees the now universally received Rule in the canon Law, *omne verbum de ore fidei cadit in aebitum*. And as to the Pretences, that he becomes thus both Debitor and Creditor, and that the Substitutes are not Creditors: This proceeds upon a Mistake, since here there is plainly *ajus quæsitum* to the Successors designed, and that whither, *nati* or *nascituri*; so that every Substitute is truly a Creditor, else the Obligement were elusory. And this must hold more strongly in the present Case, where the Pursuer is *Nominatim* substitute, As to the Act 1685. *imo*. It was only declaratory of what was Law, but does not determine the Case in Hand. *2do*. The declaring it lawful to impose Conditions on Heirs, does not say that they cannot impose them on themselves, for that was not the Subject of the Law, yea was not doubted. For it was more doubtful, if Persons could

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impose Conditions on their Heirs, because it fell out at a Time when they had no more the Property. And therefore the Argument from this Law should rather run thus, if a Man can effectually bind his Heirs, *multo magis* himself. As to the Decision founded on, the Reasons given in the Interlocutor it self, do abundantly set forth the Specialities of that Case: For 1^{mo}. There was no onerous Cause for making the Taillie as here there is. 2^{do}. It was in Favours of Heirs to be gotten: Here it is to a certain Person *Nominatim*. 3^{tio}. Actually revoked by Sir William with Consent of his Father the first Institute; whereas here the Father's Consent is not pretended, tho' actually agreed to.

There were also adduced for the Pursuer two Decisions, the First upon 3^d February 1674. *Drummond contra Drummond*, where a Person having taken a Bond payable to himself and the Heirs of his Body, which failling to his Father, which failling to a Third Party, and obliging himself to do no Deed prejudicial to the Taillie, and that the Debitor should not pay without Consent of the said Third Party; notwithstanding the First Creditor having exacted the Debt; The Third Parties Assigney pursued a Declarator of the Irritancy of Payment: And the Lords found, that by the Conception of this Bond, Payment made by the Debitor, without Consent of the Heir of Taillie, was not warrantable. And if this hold in Substitutions of Sums of Money, much more will it hold in Lands, where Parties have Regard to their Families.

Answered for the Defender, That here the original Bond was qualified, being the Price of Land sold with Consent of the Substitute, who thereby appeared to have an Interest in the Cause, and the Debitor was also bound up as to the Payment.

The other Decision adduced for the Pursuer, was 28th January 1668. *Binning contra Binning*, Where an Heiress having obliged her self to enter Heir to her Father, and resign her Lands in Favours of her self and the Heirs of her own Body, which failling to the Heirs of her Father; and obliged her self to do nothing contrary to that Succession: She afterwards married, and in the Contract disposed these Lands to her Husband *nomine dotis*: But before this Contract she stood inhibited at the Instance of her Father's Son of a Second Marriage; whereupon she being charged to fulfil the Bond, in discussing the Reasons of Suspension: The Lords found the Letters orderly proceeded, till she Entered and Resigned conform the Bond. And by the Words of the Interlocutor it appears, That the *ratio decidendi*, was founded in her Obligement not to alter.

Answered for the Pursuer, That in that Case the Lands were to descend to the Daughter as Heir of Line or of Provision to her Father, who might have qualified her Succession as he pleased, and he did the Equivalent by taking her Bond, which on the Matter did qualify her Right, and so that Bond was onerous.

The Pursuer further alledged, That the Succession in the Charter 1686 is provided, failing the Male Issue, to the Resigner's Eldest Heir Female, which failing to the Eldest Heir Female of his Father the Defender's Grandfather's Body, which is a Demonstration, that by Heir Female of the Resigner's Body, was not mean'd the Son's Daughter, or otherwise this Clause would be an absurd Tautology: So that this may be said to be the Father's Deed, at least his Intention from the Beginning.

Answered for the Defender, That there was no Tautology in the Substitution, because the Defender's Grandfather had Five Daughters who, failing the Heirs-female of the last Sir John's Body, would have been called to the Succession by that Substitution, because they were Heirs female of the Grand-father's Body, and not of the Father's: For the Heirs-female of the Defender's Body were certainly the Heirs-female of his Father's, Grand-father's, and all his Predecessors Bodies: And it was upon that Consideration that the Heirs-female of his Father's Body being called to the Succession, there was no Need of mentioning the Heirs-female of the Defender's Body; because that Branch comprehended both his and his Father's Daughters: But to comprehend the Grand-father's Daughters there was a Necessity to go higher.

There were several other Alledgances proponed for the Pursuer, and Answers for the Defender, anent the Onerosity of the Contract; but these not having influenced the final Decision in the Cause, shall be here past over: Only 'tis to be remarked, that the Lords upon the 22d February 1715, after Consideration of the Papers given in, and having heard the Lawiers in Presence, did find, The Irritancies in the Contract of Marriage, did not affect the Defender Sir John Shaw, who made the Taillie, and therefore declared in so far as concerned the Lands in the Charter and Infeftment in the Year 1686, to which he had Right before the Contract and Taillie. But a Reclaiming Bill being given in by Mrs. Houston upon the 25th thereafter, and Answers for Sir John, the further Consideration of the Clause was delayed till the Summer Session.

And then it was further *Alledged* for the Defender, That the Pursuer admits that gratuitous Bonds of Taillie, unless clogged with prohibitory and irritant Clauses, are revocable by the Maker: But so it is that an Obligement not to alter, is of no greater Force than an Obligement to Resign; For if these Words, *I bind and oblige me to Resign*, be revocable; For what Reason can these Additional Words, *I bind and oblige me not to alter*, make the former Obligation more binding and effectual, since the Second is at best but an Accessory Obligation to the First?

Answered for the Pursuer, That she never admitted such a Position: What she advances is, That a Person having obliged himself to resign in his own Favours and several Substitutes, without a Clause prohibitory, stands bound, and has implemented his Obligement, when he has actually resigned, and can change, not the Obligement, (for by Implementing, it becomes extinct) but his Destination of Succession, in vertue of his absolute and unlimited Fie; and if he refuse to Implement, 'tis not because the Substitutes have not Right to compel him to it, that in this Case they would intent no Action; but because when he had implemented it, he could alter. And this Distinction wants not its own Use: For if the Resigner was rendered incapable to alter by Infirmary or Sickness, the Right will stand good in favours of the Substitutes; but if the Clause not to alter, be adjected, the Freedom the Granter had is now tied up; and tho' the Obligement to Resign be not more binding than it was before that Adjection, yet it becomes now of more Use to the Substitutes; neither is the Adjection accessory, but a new Addition to the former Obligement, and *ad actionem proficit, unde renovatus videtur Contractus*

tractus, as L. 7. § 6. ff. de Pact. expresses it, it being the Natural Consequence of a *Pactum adjectum* to reform an Obligation.

The Defender further alledged, That by the Civil Law no Man could be bound up from the free Disposal of his Estate by any Paction or Obligation, tho' a Contract of Marriage; and tho' our Custom has receded from it as to onerous Contracts of Taillie, yet as to all other Effects that Law yet takes Place with us as to Taillies. Now by the Civil Law, *Institutio heredis est ambulatoria usque ad supremum vitæ halitum*; and no Engagement not to alter is of any Effect by the Roman Law; nor can it be denied, that our Taillies are of the Nature of Testaments by that Law, a Testament being *voluntatis nostræ iusta sententia de eo quod quis post Mortem suam fieri velit*; and therefore Taillies are as ambulatory as Testaments were by the Roman Law, and as Testaments concerning Moveables are by ours.

Answered for the Pursuer, That 'tis the first Time that the Authority of the Roman Law was pled at our Bar in this Point: For 'tis certain that as to Heritage, we have not so much as the Name of a Testament; and even in the Subject where we use them, the Lord Stair says, P. 502. *Inst.* That the Power of Testing may be restricted by Paction, as it is actually restricted by Law. And it were a strange Thing with us now a Days to receive the subtle Law of the Romans, which depended upon a long Train of Niceties special to that People, and neglect what they in Concert with all Nations reckon Sacred, that is, Paction and Agreement. In fine, our Successions imitate *Donationem mortis causa*, which is certainly of its Nature revocable, but by Adjection not to alter, *transit in Donationem inter vivos*, which is Irrevocable.

It was further Urged for the Pursuer, That as the Opinions of all our Lawiers favour her Claim, so particularly Sir Thomas Hope in his Little Book, Title, Taillies, says, That if there be a Clause not to alter, the Party honoured may use Inhibition.

Answered for the Defender, That there the Heir (according to Hope) is indeed burdened with the prohibitory Clause, because he succeeds to a qualified Fie; but he is far from saying, That the Maker himself cannot alter. And of the same Opinion are Dirleton and Sir James Stewart.

Replied for the Pursuer, That tho' Hope mentions the Case, as a Restriction upon the Heirs, which was the most usual; yet it's plain by saying in the General (that in this Case the Tailzie must not be broken) and allowing Inhibition to be good upon it, he plainly Establishes what is asserted. And conform to him, Sir George Mackenzie in his Manuscript of Tailzies, § Inhibition, does likewise Distinguish betwixt a naked Destination, where he says Inhibition can have no Effect, and an Inhibition raised upon an Obligation not to alter, which he says makes all Deeds done to the contrary Reducable.

Lastly, It was Alledged for the Pursuer, That tho' he the Son were the Fiar, yet it plainly appearing that this was not a simple Deed of his *ex proprio motu*, but an Agreement betwixt Father and Son, and whereon the Father was made to Rely as the Settlement of his Family; it becomes so much the more strictly binding upon the Son: For upon the Matter here, there was a Contract of Taillie betwixt the Father and Son, and Transfused into this Contract of Marriage, where the Father must be understood

derstood to Stipulate in Favours of his own Daughter *Nominatim*; and this is Evident, since it's expresly Provided that there should be no Alteration, except in the Case, that the Father and the Son during their joint Lifetimes, and with mutual Consent did alter.

Answered for the Defender, That these Suppositions were only the Pursuers Notions, without any Foundation in Law. For it has been sufficiently cleared, that the ordinary Stile of Contracts contains Substitutions, in such Manner as the Parties please; but none of these Disables the Fiar to Alter, Order and Direct what concerns the Substitutes at his Pleasure. *2do.* Tho' such a Contract had been betwixt the Father and the Son; yet it would be of the Nature of an Interdiction, which the Law allows not.

Hew Dalrymple,
Graham, &c. for Sir
John Shaw. Alt. Sir
Walter Pringle & Co-
lin Mackenzie.

The Lords found the Irritances and Clause not to alter, contained in the Contract of Marriage, are binding on Sir John Shaw who made the Taillie, even supposing the Pursuer were a Gratuitous Substitute; And Assoillied Houston and his Lady from the Declarator, and ordained the Contract to be Registrat.

Mackenzie, Clerk.

DECISION CXX.

[19th July 1715.]

Miln of Hatton,

AGAINST

The Lady Galraw.

Miln of Hatton having Right by Progress to an Adjudication led against John Falconer, Apparent Heir to the Deceast Sir John Falconer of Galraw, Adjudging from him as lawfully Charged to enter Heir to his Father, the whole Lands that belonged to him, particularly the Lands of the Bank of Ballochie: He did insist in an Action, against the Lady Galraw, for Repetition of the Rents of the said Bank, Intrometted with by her, from 1690 to 1702.

And it being *Answered* for the Lady, That she having intrometted with the Rents of the said Lands by her Sons Right of Apparency, and applyed them to his Aliment (which she Instructed) she was *bonæ fidei* Possessor, and not obliged to Repeat.

Actor Archibald?
Ogilvie. Alt. Horu. }

The Lords found, the Lady's Intromissions with the said Rents were bona fide, and Ascribable to the Aliment and Education of the Apparent Heir, ay and while she was Interpelled by the Citation in the Mails and Duties against the Tenants.

Robertson, Clerk.

D E.

DECISION CXXI.

Eodem Die.

Dame Barbara Jaffery,

AGAINST

Scot of Brothertoun.

THE deceast Sir John Falconer of Balmakelly, having a Fishing upon the Water of Northesque, belonging to his Lands of Galraw; and John Scot of Comistoun having the Cruives a little below the said Fishing: They entered into a mutual Contract, by which Sir John obliges himself not to quarrel any Irregularities about the said Cruives, by which his Fishing was prejudged. And Comistoun bound him, his Heirs, &c, to pay to Sir John, his Heirs, &c. 24 Lib. Scots Yearly; With a Provision, That in Case by a legal Sentence at the Instance of any Person; the saids Cruives should be altered, and Comistoun Necessitate to observe the Distance of the Hecks, Hight and Breadth, of the Dam-dike, Saturday's Slop, &c. That then he should be free as to all Terms thereafter, till the Obtainer of the Decreet shall Discharge the same; Intimation being always made to Sir John of the said Action before *Litis Contestation*. The Lady Galraw as being Infeft in the Lands and Fishing, insisted against Brothertoun and Collonel Scot his Brother, as representing Comistoun their Uncle upon the passive Titles; and at length recovered Decreet against them for the 24 Lib. Scots, as the agreed Tack-duty betwixt Sir John and their Uncle. And they Suspended upon several Reasons, and among others these Two, *viz.* 1^{mo}. That they being decerned in General to make Payment of the Sum, it behoved to Divide betwixt them *pro rata*, as if they had been bound Conjunctly in one Bond: And adduced two Decisions observed by Durie, the one the last of February 1626, Where the Lords found, 'That Two Persons Pursued upon the passive Titles, the one as Heir, and the other as Executor, were only Liable each for his own Share, in respect it was not Libelled that Ilk one of them should be Liable; And another Case, the 16th of November 1626, betwixt two Vicious Introusetters. 2^{do}. Comistoun's Contract with Sir John Falconer, was *ad diem*, *viz.* until a Decreet was Recovered at the Instance of one of the upper Heritors for Regulating the Cruives; And now Brothertoun produces one, so that the Term of the Obligation is expired.

Answered for the Charger, 1^{mo}. That these Objections however Competent, yet were Omitted out of the first Decreet Charged on; at which Time the Suspenders should have Pled, that they could only be Liable *pro rata*. And tho' the Libel bears not that Ilk one of them should be Liable, yet the Title whereon they are Conveened being such as would have Subjected each of them, they cannot now found upon this Defence, far less can Brothertoun, who is Successor in this very Fishing. And as to the Decision adduced, Durie adds, That notwithstanding this Decision, the Lords use to Decide, where Two Executors are decerned to pay a Creditor; Yet that the Creditor may seek Execution upon that Sen-

tence, against any of the Two: Conform to which the Lords have ever since Decided, particularly 9th December 1628 *Sutor contra* ——— To the *Second*, besides Competent and Omitted, the said Decreet was not in the Terms of the Contract, which required Intimation to be made of any Pursuit to Sir John, his Heirs, &c.

Aitor Horn. Alter ?
John Ogilvie. }

The Lords Repelled both these Reasons of Suspension,
as being Competent and Omitted.

Roberton, Clerk.

DECISION CXXII.

[20th July 1715.]

Benjamin Allan,

AGAINST

Hamilton of Little-Earnock.

Benjamin Allan having Right by Progress to 500 Merks, as a part of 1000 Merks contained in a Bond granted by the Deceast *Little-Earnock* to *Alexander Orr*, and his Tutors and Curators in his Name, and for his Behoof; Pursues the present *Little-Earnock* upon the passive Titles; who at Calling produced a Discharge granted by *James Henderson* Step-Father to *Orr*, granting the Receipt of 500 Merks, with 20 lib. as a Years Annualrent in part Payment of a greater Sum borrowed by *Little-Earnock*, from him, conform to the Bond, and discharges him *pro tanto*, to which Discharge *Orr* is a subscribing Witness. And this Discharge the Defender alledged did cut off the said Bond (the other half thereof, having been paid to *William Douglass* Vintner, who had Right thereto by Progress.) And that,

Because, 1mo. The Bond bearing the Money to have been received from the Relict (*Orr's* Mother) and her Second Husband *Henderson*, in Name of her Son, and being payable to him, his Heirs, &c. and his Tutors and Curators in his Name; the Payment was lawfully made to *Henderson* as Tutor or Pro-tutor to him, because *bona fide* Payment is still by Law sustained to dissolve an Obligation, and here was *fides uberrima*; for the Money was borrowed from *Orr's* Mother and her Husband, for her Son's Behoof while he was Minor, and while she and her Husband acted for him as Curators. 2do. Because *Orr* by signing Witness to the Discharge did homologate the same: For certainly, where a Witness is principally concerned in the subject Matter of a Writ, his knowledge of its Contents is presumed; as was found in June 1663, *Steuart contra Steuart*, Where the Lords found, That an Apparent Heir's Witnessing to a Writ on Death-bed, was equivalent to a Consent, in regard he was in Law presumed to have known, or ought to have known the Nature of the Right, because of his obvious Concern in the subject Matter; Which the Lords found, made a great Difference betwixt him subscribing as Witness, and a Stranger not interested. As also in Anno 1710, In the Case betwixt *Home of Whitefield* and the Laird of *Castlesteuart*, The Lords found, That the Viscount of *Kenmure's* Subscription as Witness to *Castlesteuart's* fitted Accompt with his Father, did so homologate the said Accompt, that the Viscount could

could not afterwards impugn the same, but that it stood probative against him, because of his subscribing Witness thereto, and obvious Concern in the subject Matter.

Replied for the Pursuer 1^{mo}. That by comparing the Conception of the Bond it self, with the Discharge, it clearly appears that they do not meet; because *James Henderson* is neither the Person to whom the Bond is made payable, neither is he Tutor or Curator to *Orr*; and tho' he were, yet the Minor must discharge, and the Curator only consents. 2^{do}. Nor will the signing Witness help the Matter, since Witnesses may sign Papers without knowing the Contents, nor are they guilty of any Fault in so doing. And that Consent is not inferred by one's signing Witness to a Writ, is evident by the Decisions 1st February 1676, *Veitch contra Ker* and *Pallat*. and 26th July 1672, *Gordon contra Meinzie*.

Astor Ja. Hamilton Olivestop. Alter
Sir James Nasmyth.

The Lords repelled the Defences, unless the Defender would alledge, that the Money was applied to the Minor's Behoof.

Gibson, Clerk.

DECISION CXXIII.

[21st July 1715.]

William Gordon (*Campvere*) Merchant,

AGAINST

William Elliot.

THE *African* Company, having in 1700, fitted out the *Speedwell*, in pursuance of an Agreement with Sir *David Nairn*, and others Residenters in *London*, whereby the saids Persons were to Trade in the Name, and under the Protection and Privilege of the Company: By another Agreement with *Robert Innes*, the Company constitute him Supercargo, and allowed him 600 *Lib. Sterling*, and to carry out 650 *Lib. Sterling* more in Money and Goods; and he was to account to the Company, and return the Product of 11000 *Lib. Sterling* stocked in by the Company and their *London* Partners, to *Scotland*. The Ship was afterwards Wreckt in the Straits of *Malacca*: But Mr. *Innes* saved most of the Cargo, and continued the Trade till he Died, leaving both the Company's Stock and his own in the Hands of Mr. *Bernard Wych*, the *English East India* Company's Factor: To whom thereafter the Company gave Power to manage the said Ship and Cargo; and at the same Time Impowered *William Elliot* Lace-man, to send such further Directions to *Wych*, as he should think most advisable, and to settle Accompts with him: But with all took *Elliot* bound (and the *English* Partners his Cautioners) to be accomptable to the Company, and in case the neat Proceed of the Effects in Mr. *Wych*'s Hands should fall short of any Charge that might be against the Company, the *English* Partners should indemnify the Company thereof according to their Proportions, the Company being always liable effecting to their Interest. *Wych* accordingly remits to *Elliot* 6300 *Lib.* and *William Gordon* having Assignment from *Robert*

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Innes

Innes for 200 *Lib. Sterling* of the foresaid 600; and being Creditor to him in some more, having first Arrested in the Director's Hands, raises a Process against *Elliot* before the Lords; but a little before that, another Process was raised against him at the Instance of the *English* Partners in *Chancery*, calling for the foresaid 6300 *Lib.* in order to be divided: In which Process *William Gordon* so far appeared that he gave in a Dilatory Defence, alledging, That the Matter betwixt him and *Elliot* stood under Arbitration.

And here it was *Alledged* for *Elliot* the Defender, That he could not be liable to the Pursuer as Executor to *Innes*, because of the said other Process in *Chancery*; which commenced before the intenting of this Cause before the Lords; and therefore was a *Lis alibi pendens*, and that the Defender had, in Obedience to an Order of *Chancery*, lodged that Money in the Hands of one of the Masters of that Court: So that he cannot be conveyed a second Time.

Answered for the Pursuer, *1mo.* That tho' *English* Adventurers might have an Interest in the Cargo by the Company's Permission, yet still all was managed in the Company's Name; and therefore as any Intruders could have been prosecuted in the Company's Name any where, so if they or their Effects were found in *Scotland*, they might lawfully be pursued before the *Scottish* Courts: And therefore the Defender cannot pretend to create a Court to himself in any other Kingdom, thereby to exoner himself touching a *Scots* Subject, and where the Parties chiefly Interested were all *Scotsmen*. *2do.* Mr. *Elliot* received the Effects from *Wyck* in Right of the *Scots* Company's Letters of Attourney; and the *English* Partners bound themselves with him, that he should be accountable to the *Scots* Company: So that these Adventurers could not afterwards lawfully intent a Process in *Chancery*, thereby to change the *Forum competens*; since by giving Bond in the *Scottish* Form, which was Registrate here before intenting the Process in *England*, they subjected themselves to the *Scottish* Courts. *3tio.* The Pursuer, long before the Letters of Attourney to *Elliot*, laid on Arrestments in the Hands of the *Scots* Directors as Creditors to *Innes*; whereby there being a *Nexus realis* on the Subject, which could only be prosecute in *Scotland*: As the Directors themselves could not dispose on the Subject, so as to evacuate the Pursuer's Arrestment, so far less could their Factor commence a Process in *England*, thereby to evacuate the Pursuer's Diligence.

Replied for the Defender, *1mo.* That Mr. *Elliot* being a Residenter in *London*, and having received the Effects of the Cargo there, which belonged to the Proprietars, whom the *Scots* Company had reinvested; could any Thing be more competent than for them to pursue him where he lived, and where the Effects were? *2do.* The Pursuer compeared in the Court of *Chancery*, as appears from his Answer given in there, long before any Citation at his Instance against the Defender in *Scotland*; so that it were ridiculous to pretend that the Defender should be obliged to answer in a Process before the Lords, for a Subject taken out of his Hands by Order of a Sovereign Court in *England* where he resides; and where the Pursuer was compearing and founding upon his Right: For so he might come to be liable in Double Payment, by Answering a Trust whereof he is already exonerated.

Duplied

Duplied for the Pursuer, That the Answer put in by him in *Chancery* is no more but Dilatory, bearing that he could not Answer to the Charge of the Bill, by Reason that the Cause was standing under Arbitration betwixt the Plaintiffs and him; and after this dilatory Defence was overruled, the Pursuer never gave in any peremptor one. And tho' the Process proceeded betwixt the Plaintiffs and Mr. *Elliot*, and was brought to a Hearing; yet it proceeded against Mr. *Gordon* only in default of Appearance, which is no more than a Decreet in Absence with us.

Attor *Graham. Alter*
Sir *John Ferguson.*

} The Lords found no Process, and sustained the Dilator
of his alibi pendens.

Gibson, Clerk.

DECISION CXXIV.

[22d July 1715.]

Sir *Patrick Home*,

AGAINST

The Earl of *Home*.

IN an Action of Exhibition at Sir *Patrick Home*'s Instance against the Earl of *Home*, of an old Apprising, Grounds thereof, &c. it being among other Things alledged for his Lordship, That the Disposition granted by Sir *Patrick*'s remote Author of the Apprising, was lying by the Granter the Time of his Decease; and therefore that it not being a delivered Evident, another Person who got a posterior Disposition, and whom the Earl Represents, ought to be preferred: And for proving the Alledgance, the Earl having produced a Petition to the Lords, given in by Sir *Patrick*'s immediate Author, wherein he acknowledges, That the saids Papers were lying by his Cedent the Time of his Decease. The said Petition containing also a Narrative of another Matter of Fact; which, if proven, or acknowledged, would overturn the Earl's Defences: The Question came to turn on this, Whether the Earl was obliged to take the said Petition he founded on as it stands? or, If he could found upon one Part thereof that makes for him, and leave out another which makes against him?

And it was contended for the Earl, That he was absolutely free to found on the Judicial Acknowledgment contained in the Petition, without being obliged to take the Contents of the Petition intirely together: Because, that even in a Judicial Oath where the Tie is greater; yet when it contains extrinsick Qualities, the Oath is divided; and any Acknowledgment therein stands binding for the Party, while the extrinsick Qualities are rejected, unless otherwise proven. Now an Oath is of more Weight, because *ita Juratum est*; whereas Sir *Patrick* had nothing to support the Stories in his Author's Petition, but his Author's naked and ultroneous Assertion; for Example, If in the present Case it had occurred, that when Sir *Patrick*'s Author gave in the Petition, the other Party had alledged that the Writ was undelivered, and referred the same to the

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Petitioner's Oath, and that he had deponed in the very Terms of his Petition, certainly it might have been pled, That the Defence was proven by the Oath, and yet still the Petitioner was obliged to prove the other Matters of Fact in the Petition, and consequently that the Oath might have been divided, and not taken as it stood.

Answered for Sir Patrick, That Oaths bearing extrinsick Qualities do not concern the present Case, which relates to one individual Writ containing Matter of Fact, which cannot be divided: And if the Earl had adduced Witnesses for proving the Writ to be lying by the Defunct, and if they had deponed in the Terms of the Petition foresaid, their Depositions could not been divided, but would have been taken intirely as they stood, to prove against the Earl as well as for him; so that seeing the Earl produced the said Petition, and made use of it *in modum probationis*, it must be taken intirely as it stands, and cannot be divided.

It was further urged for Sir Patrick, That his Alledgeance was founded, not only upon the certain Rule and Principle of Law, *quod approbo non reprob*: But also it is clearly determined by the common Law, in L. 7. ff. *de bon. Libert.* Where it is said, *nam absurdum videtur, licere eidem partim comprobare judicium defuncti, partim, evertere.* And L. 39. ff. *Eod. sed iniquum est, nec oportet liberto hoc indulgeri, quia non debet ex parte, Obligationem comprobare, ex parte tanquam de iniqua quæri:* And L. 16. ff. *de admin. Tutor: Sed verius se putare, posse tutorem eam Conaitionem adoles centi deferre, ut id quod gessisset Tutor in contrahendis nominibus aut in totum agnoceret; aut a toto recederet.* L. 11. ff. *de Neg. Gest. quod si in quibusdam lucrum factum fuerit, in quibusdam damnum, absens pensare lucrum cum damno debet.* And the Gloss upon that Law says, *approbare quædam & quædam reprobare non potest quis, sed debet vel omnia approbare vel omnia reprobare.* And Jason upon L. 55. ff. *de Legat 1. approbatio qua fit ut eodem instanti reprobetur, non debet attendi.* And Anton Faber in his Ration: upon L. 13. § 26. ff. *de Action. Empt.* Says, *quid ergo si Venditionem, pro parte approbare Velim, pro parte vero improbare? Non sum audiendus, quia absurdum est, unum eundemque actum pro parte approbare, pro parte improbare.*

Answered for the Earl, That the common Brocard *quod approbo non reprob*, takes place in single Facts, and where the Subject is one, but not where the same is complex. For V: G. Each Party in pleading, may lay hold on what is judicially acknowledged by the other; and by taking Instruments thereon it stands fixed: But when a Variety of Facts is alledged, a Contradictor's laying hold on his Party's acknowledgement of one, does nowise tye him to the acknowledgement of all the rest: For this were as if when a Charge and Discharge is offered in a Compt and Reckoning, and the Partys obliged by the Act of Sederunt to acknowledge or deny, it should be thereupon contended, that the acknowledgement of one Article, should tye to the acknowledgement of the whole. 2do. The Viscount of Stair plainly says *Inst. P. 501.* That the Brocard can only be understood as to the same individual: So it is further cleared from the Disposition of the common Law, whereby 'tis evident, that *confessio non ultra prejudicat, quam quoad interrogantem, Gloss in L. Fin. ff. de interrog: in jur. fac: Et scriptura privata facit fidem contra proferentem, non pro eo, nisi ab adversario fuerit probata, L. 26. § fin. ff. Depos.*

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Confessione facta in judicio datur fides contra se, sed non pro se. Gloss. fin. ad L. 1. C. de Confess. *Scriptura potest tenere pro parte, & pro parte non tenere,* Gloss. in L. 1. C. de Latin. Lib. toll. And both *Zoesius* and *Perezus* state the present Question very plainly, *Quæri possit an necesse sit litigans totam acceptet Confessionem, an vero & partem tantum acceptare valeat, partem rejicere?* And both Answer, *Si separata sint capitula nihil implicat partem Confessionis acceptare, partem rejicere.* *Zoesius ad Tit. de Confes. Perez. ad Tit. Cod. eod.*

Replied for Sir Patrick, That the Citation from *Stair* is plainly contrary to what the Earl asserts; for there treating of the *Jus accrescendi*, in the Case of Legacies, he says, That the Accrescence is necessary, and the Portion accrescing cannot be rejected; because it befalleth by one integral Right, which either must be accepted wholly, or rejected wholly, and therein *approbans, non reprobatur*. As to the Citations out of the Common Law, they do not meet the Case: For L. 26. § fin. ff. *depos.* does not concern the Case less or more: And *Zoesius* and *Perezus* are of a downright contrary Opinion, particularly *Perezus*, upon the Title of the *Cod. de Confessis. N. 15.* where he states the Question, *Sed dubitatur an debeat totam acceptare confessionem, an vero sufficiat partem acceptare? Quod non videtur ex ratione, quod circa eundem actum non admittatur divisio; & in omni prope materia, totum acceptare debeat, aut reprobare.*

The Lords at first inclined to find, That the Contents of the Petition could not be divided, but must be taken intirely together; but upon fuller Information, and Petition and Answers.

Astor Ipse. Alter ?
Sir James Nasmyth. }

Their Lordships Found, That the Earl might found on the Concession and Acknowledgment in Sir Patrick's Decedent's Petition, That the Disposition granted to him was lying by the Granter the Time of his Decease; and at the same Time might deny the other Facts alleged, and offered to be proven in the same Petition.

Gibson, Clerk.

DECISION CXXV.

[22d July 1715.]

Elizabeth Home and her Husband,

AGAINST

Trotter and Sir Robert Home.

THE deceast Sir John Home of Renton, in Anno 1671 sets a Tack to Mr. Patrick Home his second Son, of his whole Estate, for Payment of his Debts, only allocating an Aliment of 2000 Merks Yearly to Sir Alexander Home his eldest Son, for Payment whereof he obtained a Locality of the Mains and Parks of Renton: Thereafter in Anno 1694, there is a Contract betwixt Sir Alexander and his said Brother

Brother Mr. (now Sir) *Patrick*, whereby the Property of the Estate is disposed to him, he renouncing the Tack, and undertaking the Burden of the Debts, and assigning the Mails and Duties of a Room called *Presses*, and others, to Sir *Alexander* during Life; which he accordingly possessed. But the Contract stands reduced at the Instance of Sir *Robert* Son to Sir *Alexander*; and now the said *Elizabeth Home* being confirmed Executrix to her Father Sir *Alexander*, charges *Trotter* the Tenant in *Presses* for Payment of the Rent of the said Room; and he having Suspended, while the Charger and Suspender are in Dispute, Compearance is made for the said Sir *Robert Home*, Heir of Provision to Sir *Alexander*, who made the following Exceptions against the Charger's Right.

1^{mo}. That the foresaid Contract, (which is the only Title whereon the Charger pretends that the Mails and Duties of the *Presses* did belong to Sir *Alexander*) stands reduced at Sir *Robert's* Instance. 2^{do}. That the Charger as nearest of Kin can have no Interest therein, because the Moveable Debts of the Defunct are a Burden affecting the Executry; and it does not yet appear that the Moveable Debts of Sir *Alexander* or Sir *John*, (whom he represented) are paid: For that can be only known upon the Event of the Compt and Reckoning betwixt Sir *Robert* and Sir *Patrick*. And Sir *Robert*, as Heir of Provision to his Father, is concerned to prevent a Misapplication of any Part of the Moveable Estate which is Subject to his Relief, for the Moveable Debts of his Father or Grand-father.

Answered for the Charger, 1^{mo}. That the Tack 1671 was renounced by Sir *Patrick* in favours of Sir *Alexander*, by the Contract 1694, and his Liferent reserved as said is. And tho' in the Question betwixt the Heir of Provision and Sir *Patrick*, the said Contract was so far reduced, as to stand for a Security only for any onerous Cause or valuable Consideration paid by Sir *Patrick*; yet the same can nowise prejudice the Executrix of her Claim: For her Father's Liferent was nowise thereby reduced; nor was the Renunciation in Favours of Sir *Alexander* thereby reduced, nor in Question. To the Second, *Answered*, That the Executrix her Claim, is nowise to be involved in the Question betwixt the Heir of Provision and Sir *Patrick*; and that she is equally founded, whether the Debts were paid or not: For if not, then the Disposition in the Contract 1694 was to stand, tho' only as a Security to Sir *Patrick*, who had undertaken the Debts: And if paid. Sir *Alexander* had the full Right to the Lands.

The Lords preferred the Executrix to the Rents of the Lands of Presses in Question, reserving to Sir Robert his Relief against the Executrix, for the Father or Grand-father their moveable Debts, at his Father's Decease, as accords.

Astor Alex. Fal. 7
soner. Alter Hay. 5

Robertson, Clerk,

D E.

D E C I S I O N CXXVI.

[22d July 1715.]

K E R,

A G A I N S T

B R O W N.

THE Lands of *Merfington* being set in Subtack by *Brown* of *Bassanden* to the said *Andrew Ker*, *Andrew* draws a Bill of the Date of the Subtack upon *Home* of *Kaims*, ordering him to pay to *Bassanden* 199 *Lib. Scots*, which, with his Receipt, should be a sufficient Discharge of the equivalent Sum due by him to the Drawer: The Bill was accordingly paid, and the Receipt given up to *Ker* by *Kaims*, as an Instruction of Payment. Whereupon *Ker* having insisted against *Bassanden* for Repayment of the Sum, it was alledged for him,

1mo. That all Receipts of Money do imply an Obligation on the Granter to be accountable and repay, unless the Receipts be granted upon the Granter's own Account; which cannot be here, where the Pursuer's Precept is only of the Nature of a Mandat by him to the Defender to receive it; and he having received accordingly *tenetur ex Mandato* to Refound. And if it were otherwise, the greatest Merchants might be ruined, who use frequently to give such Mandats to their Servants. 2do. This Bill was only a Mandat for the Granter's Behoof; Because, 1mo. It does not bear *Value received* of the Defender, which in this Case would have been very necessary, because it bears *Value of the Acceptor*, and for that Value, a full Discharge to him; and since no such Value is granted to the Defender, which it ought to have done, since Value in another Case is exprest, the Draught must only be understood as a Mandat to receive the Money for the Drawer's Use. Especially seeing, 3tio. The Precept is not in the ordinary Stile of Bills where Value is given; for it says, *And this, with the Defender's Receipt, shall be a sufficient Discharge*, &c. whereby the Design of the Parties appears to be, That he should be accomptable, and his Receipt of the Money should be probative against him. 4to. Suppose the Acceptor had refused to accept or pay; then *Bassanden* would not have had Recourse against the Drawer, unless he had proven he had the Draught for Value; and till that was proven the Draught was plainly for the Use of the Drawer; and till the Value be made appear, the Contents of the Bill ought to be presumed to belong to the Drawer, and not to the Defender; since to presume Value in this Case, were to make the Value exprest of the Acceptor to be of no more Use than if it had not been exprest, or to make a Necessity to exprest Value from the Acceptor, and not to exprest the Value of the Procurer of the Draught. 5to. *Separatim*, supposing that Value is presumed tho' not exprest, yet that is only where there is no other Dealing betwixt the Parties; for where the Drawer is Debitor, the Draught not bearing Value, is presumed to be in Satisfaction of the Debt, as was found 18th July 1712, *Andrew Cheap* contra *Arnot* of *Woodmill*. Therefore the Pursuer being Debitor to *Bassanden* for his Sub-tack-duty, the Draught of this Money payable to him, must be in-

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terpret to be in Satisfaction of the said Tackduty, unless *Bassanden* prove *Scripto vel Juramento* of the Pursuer, that Value was given the Time of the Draught besides the Tack.

Answered for the Defender, That a Bill is indeed a Mandat, but not always for the Behoof of the Mandator, but of the Person (most frequently) to whom 'tis payable, and therefore the Possessor of the Bill has Recourse against the Drawer, upon a Protest for not Acceptance or Payment. 2do. A Bill is of a mixt Nature, being not only a Mandat, but an Assignation, and therefore as an Assigney in *rem suam*, could not be obliged to repete to the Cedent Sums paid by vertue of his Assignation, neither ought the Creditor by Bill be accountable to the Drawer for any Payment made by his Draught. 3tio. The *Contractus Mandati* is properly between the Drawer of the Bill, and the Person on whom 'tis Drawn, and the Payment of the Money to the Creditor, is but an Execution of the Mandat; and so cannot furnish Action to the Drawer against him, unless the Draught had been for his own Behoof.

2do. As to Value received, *Answered*, That Bills bearing no Value, presumes Value receied by the Drawer, because, had he intended to make the Procurer accountable, he would have so provided in his Draught: For *Verba sunt interpretanda, contra proferentem, qui potuit sibi clarius legem dixisse*: And so it was found, *Mickeson of Hill contra William Graham*, and *James Fairbairn contra James Goodfire*.

3tio. As to the Stile of the Bill, *Answered*, That these Words (this with his Receipt, &c.) have the same Import, as if the Bill did bear Value in their Hands: But how can this infer that the Possessor of the Bill should account for the Draught?

4to. As to the Supposition of *Kaims* his not accepting. *Answered* 1mo. That this Argument does not always conclude; for 'tis often provided by the Indorsement of Bills, that the Indorser should have no Recourse, and yet he has Right unaccountably to the Contents. But 2do. The general Proposition is wrong; For had *Kaims* refused to accept and pay, the Creditor would have had Recourse against the Drawer, unless he did prove by the Creditor's Oath, that Value was not given, or that the Draught was for his own Behoof.

5to. As to the Sub-tack, *Answered*, That the Presumption of Value received, is so forcibly inferred from the Words of the Bill, that the Lords have even found in a late Case betwixt *Baxter* and the Lady *Glenlea*, that a Bill of the foresaid Nature should not be imputed in Payment of any extrinsick Debt by the Drawer to the Possessor of the Bill, albeit he was Debitor by liquid Bonds; but found, that the Draught of the Bill implied in Value received at the Time.

6to. The Drawer here was not Debitor to *Bassenden* for any Tack-duty at the Time of the Draught; For the Tack was only granted of that Date, but the Tack-duty not payable for a Year thereafter.

Astor Colvill. }
Alter Fleming. }

The Lords found the Bill presumes to have been for Value received of *Bassanden*, to whom the same was payable.

To which their Lordships adhered, after two several reclaiming Petitions. Gibson, Clerk.

DECISION CXXVII.

[23d July 1715.]

The Children and Relict of *Forbes of Knaperny*,

AGAINST

Their Eldest Brother.

THE deceast *Knaperny* left a considerable Land Estate, and free Executry; and having five younger Children, four of whom were unprovided at his Death; their eldest Brother, before he elected Curators, grants them Bonds of Provision, bearing Annualrent from the Term preceeding the Dates, and declaring that the saids Sums are in full Satisfaction of all Bairns Part of Gear, Portion Natural, legittim, &c. and then having elected Curators, he is confirmed Executor to his Father. But the four younger Children being thereby unprovided in the interim, intended an Action of Aliment, lybelling upon the foresaids Bonds of Provision. To which the Defenders and his Curators *Answered*, That the Bonds were Null, as being granted without Consent of Curators.

Replied for the Pursuers, That the Bonds were not libelled upon as the *Medium concludendi* (which was founded upon the natural Obligation, and *Frater dives tenetur alere*, &c.) but only as a View or Meith for the Quantity of the Aliment.

Astor Elphinston. }
Alter—

The Lords found Aliment due.

Robertson, Clerk.

DECISION CXXVIII.

[26th July 1715.]

Mistress *Jean Anderson Lady Logie*,

AGAINST

Ninian Wisbart of Logie.

THE Estate of *Logie* being Tailzied under a Quality, excluding all Courtesy and Terce, and the late *Logie* infest thereon, and his Infestment recorded, but the Tailzie never recorded, as is enjoined by the Act of Parliament; when the deceast *Logie* his Relict comes to insist against the present Heritor, to have her Terce ascertained, this Clause and quality of the Tailzie was objected to her.

Answered for the Lady, That the said Tailzie not being registrate, it can have no Force in Law, as is expressly statuted by the Act of Parliament 1685. And thus the Lords found in a parallel Case betwixt *Borthwick of Hartside* and his Mother and Sisters, who pursued for an Annuity and Payment of Bonds of Provision: And he having excepted That

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both were excluded by express Clauses in his Taillie; and they Answering, That it was not Recorded, the Lords found him Liable.

Replied for Logie, 1mo. That suppose it had been a Provision by Contract, yet she would have been excluded by the Taillie and Infeftment, because her deceast Husband stood publicly Infeft upon the Taillie before the Marriage; which Infeftment being in the publick Record, interpell'd all Persons from Contracting: And so it was found in the Case betwixt the Creditors of *Annandale* and *Stormont*, That this Infeftment was like a publick Interdiction. And tho' the Act 1685 does Superadd a publick Record of Taillies, yet it has not been Decided, that there must be both Record of Taillies and Infeftments, which were a double Publication. The Record of Taillies seems to be for Publication, ay and while Infeftment be taken and Registrat, so that a Purchaser must search both: For often there is Occasion of Publishing the Taillie, which cannot be got easily by Compleating the Infeftment, and yet it was necessary to ty up the Fiar, which could not be done but by some Publication of the Taillie; but so soon as it is Compleated by Infeftment and Recorded, it is then as sufficient as if the Taillie had been Recorded; yea, it is the more ancient and known Publication. And without this Interpretation of that Act, the Appointment of the Record of Taillies would have been Superfluous, specially that there is no Nullity subjoined to that Clause of the Act which appoints the Record, nor any Time prefix; whereas a Nullity is subjoined to the Clause anent Creditors and singular Successors; and to the Clause appointing the Prohibitory and Irritant Clauses to be Repeated in the Retours, &c. 2do. There is a difference betwixt Creditors or Purchasers, and these who come in by Terce or Courtesy: For the Act was indeed made to interpel the First; but the others are not such, but only enjoy the Priviledges of Law, according to the Circumstances of the Person and Nature of the Property, as it stands with respect to Heirefs or Husband: So that the Case falls nowise under the Act 1685, as being neither the Case of Creditor nor Purchaser, but only the Division of an Estate, as ordered by Law, upon the Dissolution of the Marriage. For then the Lady, as being neither Creditor nor Purchaser, must only take her Division, in case the Nature of the Subject will allow of a Division, which in the present Case it does not.

*Attor Sir James
Nasmyth. Alter Sir
Walter Pringle.*

The Lords repelled the Defence on the Taillie, the same not being Registrat in the particular Books appointed for Registration of Taillies.

Mackenzie, Clerk.

DECISION CXXIX.

[26th July 1715.]

Christian Dallas,

AGAINST

Dallas of Cantray.

IN a Contract of Marriage betwixt the said *Christian Dallas* and the deceast *Dallas of Cantray* her first Husband, it is specially provided, That it should not be in her Power, either with or without Consent of her

her Husband, to quite or renounce any Part of her Provisions by that Contract, in Favours of her Husband, or any other Person whatsoever, at any Time in her Lifetime, without the Advice and Consent of *Hugh Dallas* her Father, or *George Dallas* of *St. Martins*; and failing them by Decease, the said *Hugh Dallas* his two eldest Sons, being had thereto in Writ, otherwise the said Renunciation to be Void and Null: And this Provision is appointed to be insert in the Infeiments to follow on the Contract, and accordingly the Clause is insert in her Sasine. Nevertheless she in her Widowity grants a Renunciation in Favours of her Son of 24 Bolls of Bear Yearly, as a Part of her Jointure; which Renunciation she delivered to the said *Hugh Dallas* her Father, who was Tutor to her said Son: But thereafter having been Married to *M^r Intosh* of *Stroan*, she and he for his Interest insist in a Reduction of the said Renunciation; and the Question being, *How far she in this circumstantiate Case could Renounce, without the written Consent of the above-named Persons?*

It was *Alledged* for *Cantray*, That the Renunciation must subsist, notwithstanding of the Provision in the Contract of Marriage; because that Provision is a Privilege in Favours of the Wife, which therefore she could dispence with, and renounce, from the common Rules of Law: And she did it, when she was *soluta Viro*, and freed of that Influence which was feared, and chiefly guarded against by the Provision. Nor does it alter the Case that the Provision is insert in the Sasine, because it is still but a personal Privilege in Favours of the Wife, which in Law she could Renounce. *2do*. Because not only granted by the Mother in her Widowity, but in Favours of her own Son, in the Hands of her own Father, Grandfather and Tutor to the Child; and the very Person who by the Provision in the Contract, may consent to and authorize such Renunciation. Nor was a Consent in Writing necessary, for here upon the Matter, there is a Consent in Writing; for her Father receives from her a Renunciation to himself, for the Behoof of his Grandchild and Pupil. This is Writ, not indeed granted by him, but yet accepted by him: He could not properly sign any Consent to it, it being in Favours of himself, just as a Husband who must authorize and consent to his Wife's Deed; yet if it be in favours of himself, his Acceptance of it is equal to his written Consent in Favours of another. *3tio*. As to the Hardship upon *Stroan* the second Husband, he was to know, that notwithstanding of his Wife's Liferent Infeiment, yet her Security might be renounced or qualified by any personal Deed of her's; and therefore he must be understood to have taken his Hazard of all such Deeds. For altho' her Liferent was established by a Registered Infeiment, yet that Liferent might be restricted and even renounced, altho' such Renunciation were not Registered, since no Law requires Registration of such Writs: And tho' such Infeiments be Real for the Wife's Security, yet it is but Temporary, and therefore easier destituted and renounced, than such real Rights as pass to Successors, the Renunciations whereof must be Registered.

Answered for the Mother and her second Husband, *imo*. That tho' it be a general Rule, That *Unicuique licet favori pro se introducto renunciare*, yet it wants not Exceptions, as is Evident from the Privileges of Minors, Interdicted Persons, &c. Nor can any Person Resign their Pri-

viledge, where it is expressly Provided, that the same should not be done; Nay, where it is explicitly agreed, that any upgiving thereof should be Void and Null, as in the present Case. 2do. To the second *Answered*, That *Hugh Dallas* was to be considered likewise as Guardian to his Daughter in this Affair, where his Consent was necessary to be Adhibited for Validating the Deed; and if any such Renunciation was in his Hands, it was to be considered as a Retired Evident there, for his Daughter's Behoof; Besides that the Clause expressly requires his written Consent under his Hand, otherwise the Renunciation to be Void. 3tio. Certainly there is a Speciality in Favours of *Stroan*, His Wife's Liferent Right is Constitute by Infestment, and the said Prohibitory and Irritant Clause Ingrossed in the Sasine; he had good Reason thence to Believe, That the Right behooved to subsist, and that no Deed of hers could Impair the same, whereon he Contracted *bona fide* with her; so that no latent Deed can Evacuate that Right to his Prejudice; And tho' no such Clause had been, yet the Liferent Infestment could not be Extinguished without a Registrate Renunciation. For it's in general Provided by Law, That an Infestment upon Record, cannot be taken away by any Deed of the Party Infest, except by a Writ likewise Lodged in the publick Register, without any Respect, whether the same was a Right of Liferent or of Property.

Replied for Cantray, That tho' for Arguments Sake it were granted, That this Clause in the Contract was in Effect an Interdiction, yet it cannot hinder the Effect of a Renunciation: For here is the Consent of the Interdictor, he receives and accepts of the Renunciation, neither can that Consent be Repudiate as *in rem suam*, because the Renunciation is not properly *in rem* of *Hugh Dallas*, but granted to him for his Pupil's Behoof.

Duplied for the Mother, That if the Prohibition was to be considered as an Interdiction, then the Father's having the Custody of the Writ, cannot make the same Effectual. For Interdictor's Consent is never to be presumed in hurtful Deeds, nor to be inferred from Implications. Law requires, That their Consent be Explicitly adhibited, and in a Decreet way: And whatever Consent of an Interdictor is in another Form, is not Noticed in Law: For Interdictors ought *Incontinenter* to Interpose their Authority for Validating the Act; besides that they are to be Publish'd and Registrate.

The Lords found the Pursuer of the Reduction, could not Renounce any part of her Jointure in Favours of her Son the Defender, without the Consent in Writing, of the Persons mentioned in the Contract of Marriage.

Mackenzie, Clerk.

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DECISION CXXX.

[26th July 1715.]

Hugh Lion.

AGAINST

Garden of Laton.

IN a Process of Ranking of the Children of the first and second Marriages, of *Lion of Balgillo*, upon their respective Mothers Contracts of Marriage, and Diligence by Adjudication thereon; this Question having occurred, whether both their Adjudications were Null, their Decrets of Constitution as Heirs of Provision, proceeding without a Service? And in General, whether Services be needful in Case of Sums Provided to Bairns in a Contract of Marriage?

It was *Alledged* upon the one Side, That by our Law, Heirs or Bairns of a Marriage ought to be Served before they could assign or establish a Title for doing Diligence, as was found in the Case of *Drumelzier*, the Earl of *Tweeddale's* Son of the second Marriage, and his Brother the Earl 21st July 1676, where *Drumelzier* was bound to serve Heir of the Marriage *cum processu*, to found his Title. 2do. It is certain, That the ordinary and legal way of Establishing a Right in the Person of Bairns of a Marriage, is by Serving them Heirs of Provision to their Father, otherwise *non Constat* they were Children of the Marriage, or how many Survived.

Answered for the other Side, That there is a Distinction betwixt Bairns and Heirs of a Marriage; for Bairns require no legal Solemnity, but *eo ipso*, that they are procreat of the Marriage, they have the Designation of Bairns: So that *Balgillo's* Provision being in favours of the Bairns of the Marriage, it is effectually transmitted to them without any Service; but the Title of Heir is a legal Character, competent properly to such only, as have established the same in their Persons, by the Solemnitys required in Law. And as to the Decision, it did not meet the present Case, seeing the Provision in the Contract of Marriage, to which it relates, was in favours of the Heirs of the Marriage. 2do. Our Law makes a Distinction betwixt Lands and Sums of Money, as to manner of Transmission to Heirs: For Rights of Lands being *Feudal*, require Charter and Sasine to their Constitution, and so ought to have the Solemnity of a Service to transmit them, that it may appear who are the Heirs of the *Investiture*: Whereas personal Rights being of less Importance, require no such solemn Deeds to constitute them, and so may be more easily transmitted, when it appears *evidentia facti*, who are the Persons that have Right to such Provisions. And this was lately found in a Case betwixt *John Carnagy* and *Kinfauns* his Brother, where an Adjudication at *John's* Instance was sustained, as Heir of the Marriage designative without any Service, to carry a Provision made in his Mothers Contract of Marriage to the Heirs of the Marriage. And *Dirletoun* in the 11th Question *de Feudo pecunie, & nominum*, gives this Reason for the Distinction, *in Chyrographario si quidem debito, cum ius Personale tantum sit,*

Et ex ex Chyrographo evidens sit substitutum succedere, ut substitutus adeat, nulla alia formula opus est; sed ex chyrographo agendo, vel alio quovis actu, jure suo agnito, adidisse censetur. Sin Debitum hypothecarium sit, non transit ad substitutum, nisi adierit Et factus, sit super Præcepto de clare constat, vel ex inquisitione.

Replied, That the Case there stated by Dirleton, is wholly different from that in Question; For he states it of a Debitor granting Bond to his Creditor for a certain Sum v. g. to Sempronius, and after his Decease to Titius and his Heirs; in which Case he indeed makes the abovementioned Distinction between *Debitum Chyrographarium*, and *Hypothecarium*: But the Reason of that is, because Titius is substitute *nominatim*; whereas the Case in Question is of Bairns of a Marriage, who could not be *Nominatim* by the Contract of Marriage. And it was wrong to say, That only in real Rights, there must be Addition, but not in personal ones, which is not asserted in the general by Dirleton or any Lawier; for supposing the Provisions to the Original Creditor or Substitute, were to him and his Heirs, including Executors; that Right behooved certainly to be established by a Service; and yet it's merely personal.

Duplied, That albeit the Case mentioned by Dirleton, concerns a Substitute specially Named, yet the Question there, is concerning the Reason that a Substitute in a personal Right doth succeed to the Institute, without any Service or Solemnity to establish the Right in his Person: Whereas a Creditor by a real Right must be Infeft by a Precept of *clare Constate* or *Retour*; His Answer is, That a personal Right being of less Consequence, and requiring fewer Solemnities than a real One, the Substitute *censetur addidisse*, by pursuing thereupon, or doing any Deed to acknowledge his Right: Hence it appears, That the foresaid Provision in favours of the Children of the Marriage being personal, there is no Necessity to serve them Heirs: But they may summarily Pursue as Bairns of the Marriage, for Implement of their Provisions. This is more easily to be admitted, when 'tis considered that a Father being by his Contract of Marriage, obliged to imploy a Sum upon Security to him and his Wife, and to the Heirs of the Marriage. Process was sustained at the Instance of the Apparent Heir of the Marriage against the Father, and he decerned to imploy in the Terms of the Oligement, 7th July 1632, *Young contra Young*, 13th February 1677, *Frazer contra Frazer*. Now if the Heir Designative can pursue his Father in his own Lifetime, why should he not after the Father's Death, effectually pursue his Representatives: Or if the Bairn of the Marriage, be the Person who might be Heir, why may he not assign *cum effectu* his Provision to a third Party, in order to affect his Predecessor's Heritage; since the Death of the Father rather confirms, than weakens his Son's Right?

Triplid, That in that Case a Service-Addition were unnecessary and impracticable, as was found in *Drummelzier's Case*, That in all Obligements in favours of Heirs of a Marriage to be done before the Father's Death, as to employ Sums, taking of Lands to themselves, and the Heirs of the Marriage, &c. Heirs are here understood such as might be Heirs; otherwise the Obligation would be elusory. But in other Cases it has been often found, that an Heir of Marriage requires a Service, as other Heirs do.

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Fleming for Hagg.
Lyon. Alter Sir Ja.
Dalympie.

The Lords found both Parties Adjudications defective,
in so far as neither of the Decrets of Constitution
proceeds on a Service.

Gibson, Clerk.

DECISION CXXXI.

[27th July 1715.]

The Gubernators of *Heriot's Hospital*,

AGAINST

Hepburn of Bearford.

IN the Declarator of Non-entry at the Instance of *Heriot's Hospital* against *Bearford*, (wherein a Decision, 24th of *June* last, is already marked) it came at length to one single Point, *viz.* Whether *Bearford* should pay one Year's Entry for a Charter, conform to the Rental it was at when he made the Purchase, or conform to the present Rental, the Lands having been considerably improv'd since the Purchase? And the Hospital alledged, That the Superior must have a Year's Rent of the Lands, as they get the Time the Charter is granted.

On the other Hand, *Bearford* contended, That he was obliged to pay no more than a Year's Rent, conform as he purchased the Lands: Because, 1^{mo.} The Superior's Casualty should be reckoned as at the Time when the Purchase is made: For it is the Purchase that gives Rise to the Casualty; and if the Superior had then given the Charter, he could only have exacted the Entry conform to the Rental then; specially considering it was not so much as pled that *Bearford* was *in Mora*. 2^{do.} This appears in many parallel Instances, *v. g.* in *Titulars of Tithes*, from whom there is always deduced what was necessarily expended in improving the Rental: For till the Possessor be reimburs'd of that, he cannot be said to have the improv'd Rental free; so neither can *Bearford* be bound to pay for his Improvements: For in Reality he did not enter to such a Rental; and as he entred to the Rental, so should he pay. Another Instance may be, where we build or repair another's House, and thereby increase his Rent, tho' the House fall to him with all its Reparations; yet he cannot use the Benefit of the Property, but with the Restitution of the Expences of the Improvement; so no more can the Superior here have the adventitious Emolument, but after Allowance of what it cost the Proprietor, especially after the Casualty fell: For here is the Rule, the Time of the falling of the Casualty, which was when *Bearford* made the Purchase. Lastly. Suppose the Case of an Adjudger, that after leading the Adjudication, he improves the Lands before he gets the Charter from the Superior, certainly the Year's Rent would be only calculate as at the Time of the Adjudication. And indeed, as this would be very hard upon *Bearford*, so it should be a great Discouragement to Improvements. 'Tis usually long before Subject-Superiors can be transacted with; and this should supersede all Improvements in the mean Time.

X x

Answered

Answered for the Hospital, That the present Rental must be the Rule in this Case, appears well grounded from the Nature and Design of all Feu-Rights, but especially those that flowed from the Church, which were given with a View for Improvement ; and the Acts of Parliament touching the Feus of Ecclesiastick Persons, do expressly mention that they should not be Feued out, but for the Improvement of the Rental, that when the Fie opens, the Superior may have the Advantage of the Improvement. And 'tis to be considered, that if a Decreet of Non-entry were obtained, the Vassal who was unenter'd could not pretend to diminish the Yearly Rents falling under the Decreet, by deducing the Annualrents of the Sums he had given out for Improvement : No more then can he now pretend to offer the Rent of these Lands with Deduction of the Improvements, as a Composition to the Superior. *2do.* The *Dominium directum & utile*, are convertible Terms, and as far as the Latter goes while the Vassal is Entitled to it, so far goes the former, when the Superior comes to claim by that Right. And so, if Improvements were made by Tenants, &c. of Ward-Lands, during the Existence of the Ward, not only will the Rents as they increase be due to the Superior, but if they should the last Year of the Ward be Double of what they were at the Superior's Entry, the Relief will be due according to the Improvement as the Rents are the subsequent Year ; and in general, *edificatum solo cedit* : So that if the Superior has any Right at all to a Year's Rent, he must have it at the Time it is payable ; for if upon Pretence of Improvements we should look back, the same Argument that would allow the Rate to be imposed 3 or 4 Years backward, might carry the Defender to the Rent that was payable out of the Land, when it was originally Feued out, which were very absurd. *3tio.* It is not the Purchase that is the immediate Cause of demanding the Year's Rent, but the Entry of the new Vassal, and for the Superior's granting a new Charter, and so the Superior cannot compel the Purchaser immediately to enter after the Purchase, nor has he any Access to the Fie, but upon the Death of the former Vassal ; and therefore the Year's Rent must be due as the Rents are at the opening of the Fie, which in the present Case happened long after the Improvements were made. *4to.* If the Reverse of the Case be considered, that is, if the Rent of the Lands should for want of due Improvement, &c. decrease, certainly the Superior could not claim what they were the Time of the Purchase, but only the present Rent ; as was lately found betwixt the College of *Glasgow* and the Laird of *Dalziel*, where the Lords did not regard the old Rental, tho' instructed by Tack, but proceeded upon the Probation of the latter Rental.

Astor Graham. Alt. }
Sir Walter Pringle. }

The Lords found the present Rental is the Rule ; but remitted to the Ordinary to hear Parties Procurators, whether the Defender, who made the Improvements, being in the Natural Possession, is only liable for a Year's Rent, as the same paid at his Entry to the Possession.

Gibson, Clerk.

DECISION CXXXII.

[28th July 1715.]

Sir Lawrence Mercer of Aldie, and Mrs. Helen Mercer his Lady,
Supplicants.

There being a Reduction and Improbation raised at the Instance of Sir James Elphinston, against the Creditors of Dumfermling, and Certification ready to be Extracted against Sir Lorraine Mercer one of the said Creditors, for not Production of a Charter following upon his Adjudication, and a Decree of Mails and Duties thereon: Upon Sir Lawrence his Application and offer to shew to the Clerk of the Process the Book of the Chancery, where the said Charter is Recorded, and also their own Book, where the said Decree of Mails and Duties is Registrate; And there being no Answers given in for Sir James Elphinston.

Massie for Aldie.

The Lords held the said Charter and Decree as produced, unless the Pursuer would insist on some special Reasons of Reduction and Improbation.

Robertson, Clerk.

DECISION CXXXIII.

[28th July 1715.]

The Earl of Leven,

AGAINST

Major Arnot.

THE Earl having raised a Process against Major Arnot, for Payment of a 120 Lib. Sterl. contained in Two Holograph Missives, the Major proponed a Defence of Prescription, in regard that no Process was raised upon them within 20 Years. And the Pursuer having Answered, That the Act 1669. having indeed introduced a Prescription of such Writs, not being Pursued on within 20 Years; yet it also Established an Exception in these Words, *Except the Pursuer offer to prove by the Defender's Oath, the verity of the said Holograph Bonds and Missive Letters, and Subscriptions in Compt Books.* And the Pursuer offered to prove in the Terms of the said Exception, the Verity of the said Missive Letters by the Defender's Oath. And here the Question turning upon the Meaning of the said Exception, and whether the Missives in Question be so far prescribed, that Action cannot be thereupon sustained, unless the Verity of the Debt, and that the same is Resting, Owing, unpaid, be proven by the Defender's Oath? Or if it be sufficient to be proven by his Oath, that the said Missives are true Deeds, Holograph and Subscribed by the Party?

It was Alleged for the Defender, *imo.* That Prescription by its Nature *perimit Obligationem*, so that unless the Pursuer could make it ap-

pear by the Defender's Oath, that the Debt is Resting, the Action must Evanish; for seeing the Exception of Prescription Presupposes the verity of the Deed, the meaning of the Exception must be, that it Prescribes, unless Resting, Owing, be Proven, &c. 2do. By another Clause in that Act, 'tis Provided, That Merchant Accompts, Ministers Stipends, Mails and Duties, &c. Prescribe within five Years, unless Resting, Owing, be Proven by Oath: And by the Act 1579, Servants Fees, Merchant Accompts, &c. are declared Prescribable in 3 Years under the same Exception. So that the verity of the Debt, and not of the Deed, is to be understood in the Exception of the saids Acts.

Answered for the Pursuer, 1mo. That *omnis Præscriptio non perimit Obligationem*, for then after running of any Prescription, there could be no Proof by Writ or Oath of Party, seeing an extinct Obligation can afford no Action: So that we must Distinguish betwixt the long Prescription of 40 Years, and short ones, *quibus modus tantum probandi perimitur*. 2do. Before the Act 1669, such Writs were Probative untill the long Prescription, and must still Subsist, except in so far as Limited by that Act. 3tio. Prescription does not in all Cases Acknowledge the verity of the Obligation, since it may be opposed to a false as well as true Obligation. 4to. A Correctory Law must be Explained, according to the genuine Meaning of the Words, which here mention only the Verity of the Writ, not the Debt. And as to the other Clauses in the Act, and the Act 1579.

Answered, That these other Instances widely differ from this, for they concern Debts not Constitute by Writ, which Law presumes the Creditor will not ly out of for any considerable Time; and therefore a Prescription in such Cases, is justly Established, after a certain Number of Years, with this Exception, unless the Pursuer prove Resting, Owing, by Writ or Oath, which is plainly Distinct from the present Case.

Astor Fleeming. }
Alter Hay. }

The Lords found it Relevant by the Defender's Oath, to Elide the Defence of Prescription, that the Missives are true and Holograph, and Subscribed by him.

Mackenzie, Clerk.

DECISION CXXXIV.

[30th July 1715.]

The Creditors of Thomas Calderwood,

AGAINST

Borthwick of Cruickston.

Thomas Calderwood a little before his Death, Dispones to his Spouse several Sums, which is Declared to be for the Security and better Payment of her Liferent Annuity, provided to her in her Contract of Marriage in the first Place; and for Payment of his just and lawful Debts in the next place. Borthwick of Cruickston after Thomas his Decease, Pursues the Relict upon the Passive Titles, and she is preferred in the first

first place by Vertue of her said Disposition, but declared Accomptable to Cruickston for the Residue of the Subject. After this Interlocutor (upon which nothing was Extracted) the other Creditors Applied, And *Alledged, 1mo.* That Cruickston and they were upon an equal Foot as to the Condition of their Debts, all of them being only personal Creditors to the Defunct. *2do.* There was as yet no legal Diligence founded on, on either Side.

Answered for Cruickston, That he having raised the first Process, is preferable to all the rest.

Replied for the Creditors, That the raising of the first Process, never was in any such Competition, found to be a Ground of Preference; for supposing the Creditors Interests had not been produced till Cruickston had extracted a Decreet, and a multiply Poining had brought all the rest into the Field, even in that Case Cruickston could not have been preferred to the other Creditors, who were not obliged to have compeared in his Decreet: Much less therefore can he be preferred, when the Matter stands yet only on the Footing of an Interlocutor. *2do.* Since the Relict's Disposition is in General, in Favours of the Defunct's Creditors, they must therefore be all preferred *pari passu*, and the Relict decerned to denude in Favours of them all *pro rata*, and effeiring to their respective Debts.

Duplied for Cruickston, That he having pursued the Relict to denude in his Favours, and having obtained Interlocutor, ordaining her to denude, the same ought to be considered as a Step of Diligence on his Side, which ought to afford him Preference; and that he was in *pari casu* as if the Relict had been confirmed Executrix to her Husband, and that he had first cited her as Executrix after Six Moneths from the Defunct's Decease; whereupon he would have been preferable to the other Creditors, who had been more Remiss in their Diligence.

Triplied for the Creditors, 1mo. That Cruickston's Action was not a Process against the Relict to denude, but a common Action on the passive Titles against her, as representing her Husband; for tho' she was ordained to denude in his favours, yet that was not in Consequence of any Conclusion in his Summons, he having simply Pursued her for Payment of his Debt: So that the Order to denude, was not the Effect of any Diligence at his Instance. *2do.* By the Disposition all the Creditors have a *jus questum* to the Subject, and the Relict burdened with the Payment of their Debts, as far as the Effects would go, with a bare Preference to her self for her Liferent; Therefore no Creditor can obtain any special Advantage to the Prejudice of the rest. And as to the Ordinance to denude in Cruickston's Favours, That Interlocutor must necessarily be understood so, as the Relict should denude in his Favours, in Proportion to his Debt. *3tio.* Where the established Forms of Diligence, known in Law, are neglected, Law makes no Distinction, but brings in all Creditors *pari passu*. Now an Action of Constitution against a Representative, is no Step of Diligence, it only tending to constitute the Debt, but produces no *Jus in Re.* *4to.* Cruickston's Case differs from a Creditor Pursuing an Executer within Six Months; for that is introduced by special Statute in the Case where there is a Confirmation, and cannot be extended beyond the Case specially contained in the Statute. And it's Absurd to say, that because he was the first mover of an Action against the Relict for constituting his Debt, he ought to be preferred to the other Creditors,

seeing her Right is founded upon a voluntar Conveyance of the Defunct; and not upon a Confirmation.

Hay for the Creditors. Alter Ipse. } *The Lords found Cruickstoun preferable for his Expences, as the Ordinary should modify the same, to be paid out of the first and readiest of the Subject, and found the whole Creditors come in pari passu.* Gibson, Clerk.

DECISION CXXXV.

[30th July 1715.]

John Douglass,
AGAINST

Cochran of Ochiltrie.

IN this Action, (wherein a Decision is already marked the 13th instant) a new Defence being this Day proponed, viz. That the Pursuer had not yet proven Ochiltrie's accepting a Disposition, after contracting of the Debt; the Pursuer demanded, That Ochiltrie should be obliged to deny or affirm the same in the Terms of the Act of Sederunt.

Answered for the Defender, That the Act of Sederunt must be so interpreted, that Parties who are absent, (as Ochiltrie is) must not instantly be concluded either in Denial or Acknowledgment; but the Procurators must have a due Time to acquaint their Clients for a Warrant, either to acknowledge or deny the Fact.

Altor Col. Mackenzie. Alter Boswel. } *The Lords nevertheless held the Defender as Confest, on the receiving a Disposition after contracting the Debt.* Gibson, Clerk.

DECISION CXXXVI.

Eodem Die.

Andrew M'Ready,

AGAINST

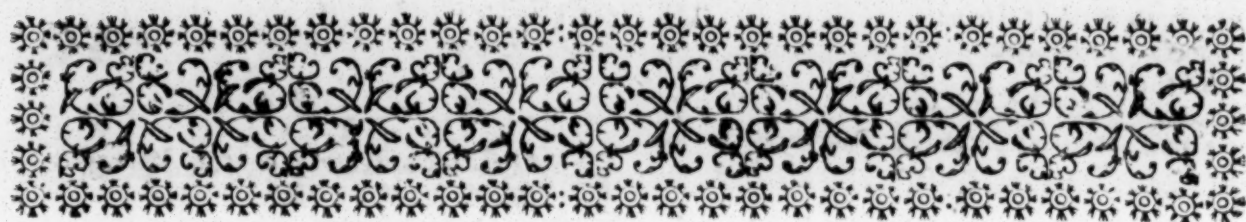
Matthew Crawford.

ANdrew M'Ready having a Bill upon Matthew Crawford, payable upon Sight; but neglecting to Protest the same within the 6 Months, he thereafter Protests and Registrates: Which being Suspended, it was alledged for the Suspender at Discussing, That the Protest and Registration being unwarrantable, as being without the 6 Months, the Letters behoved to be *simpliciter* Suspended; reserving Action *Via ordinaria* for Payment as accords. And this, because a Bill so Negotiate, can neither be the Ground of a Charge nor a Libel.

Answered for the Charger, That he was willing to turn the Charge into a Libel, which cannot be refused: For tho' the Charge be unwarrantable, yet the Ground of Action remains; and as soon as it is turned into a Libel, the Parties are in an ordinary Action, & *frustra fit per plura*, &c. And this has been always admitted, tho' a Decree were never so absurd, and proceeded even without Citation of the Party, &c. which is still allowed *ad abbreviandas lites*

McDonall for the Charger. Alter — } *The Lords turned the Decree charged on to a Libel, and found no Necessity of a new Libel.* Gibson, Clerk.

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The foregoing Decisions.

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ABJURATION OATH.] A Person having bought the Clerkship of a Regality Court, 'twas found, That the Baillie his refusing thereafter to take the *Oath of Abjuration*, whereby the Court became vacant, did not bind him to refund any Part of the Price. 23d June 1715, *Muirhead* against Lord *Colvil*.

ACT OF SEDERUNT.] The Procurators of a Party absent, not allowed any Time to procure from their Constituent, a Warrant to acknowledge or deny a Fact, in the Terms of the *Act of Sederunt*; but obliged to one or other of the Two *instanter*. 30th July 1715, *John Douglass* against *Cochran of Ochiltry*.

ADJUDICATION.] A Man, with Consent of his Wife, who was Infeft in a Liferent, granting a Heritable Bond on his Lands; found, That after his Death there could be no Mails and Duties upon the *Adjudication*, founded on the personal Obligement in the Bond granted by the Wife *stante Matrimonio*: But found, That the Heritable Bond was a good Title for pointing the Ground for bygone Rents, and in Time coming. 14th June 1715, *Shearers* against *Janet Ker*.

ALIMENT.] A Lady and her second Husband having assigned to a third Party in Trust, her former Jointure, as an *Aliment* for her, during her Husband's Absence, which nevertheless he afterwards revoked, as being a *Donatio inter Virum & Uxorem*; 'twas found, That she had Right to all Annuities due preceeding the Revocation, and till it was founded on, these Sums being appropriate, as said is; and the Revocation found not to exclude the Lady, in so far as concerned a *suitable Aliment*, since it was made use of, and in Time coming, during their separate Abode. 9th February 1715, *Gordon* against *Gordon*. *Vide, Trust*.— A Sum being appropriate by the Privy-Council for a Wife's Aliment, her Husband having deserted her, and thereafter returning, yet it was found, That the Sum was not affectable by the Husband's Credi-

tors. 16th December 1715, *Spruil* against The Duke of *Douglass*.— A Major, even without Paſſion, found liable to pay for his *Aliment*, to a Person who usually Alimented for Money, 23d June 1715, *Forret* against the Representatives of *Carstairs*.— A Liferentrix found bound to Aliment the Fiar, tho' thereby the Liferent (being small) was exhausted. 12th July 1715, *Cunningham* against Dame *Margaret Ramsay*.— An Heir granting Bonds of Provision to his younger Bretheren, found obliged to Aliment them in the *Interim*. 23d July 1715, Children of *Knapernie* against Their eldest Brother.

ASSIGNATION.] Being granted for Security and Relief, the Assigney (at the Instance of another Creditor of the Cedent) was decerned to Exhibit such Instructions of the Particulars assigned, as came to his Hands, or hold Compt therefore. 17th June 1715, *Nicolson* against Sir *James Sharp*.

B.

BACKBOND.] A Trustee in a Disposition to Lands (in order to sell them) having given Backbond to hold Compt to the Disposer for the Price; in a Competition betwixt the Trustee's Creditors, and those of the Disposer, the Latter were preferred, tho' the Disposer was never Infeft. 14th July 1715, Burgh of *Finmonth* against *Forbes of Ballogie*.

BANKRUPT.] In a Competition betwixt two Creditors of a Person Insolvent, found, That Insolvency of the common Debitor, with Horning and Denunciation against him, was not relevant *per se* to give the User of the Diligence the Benefit of the last Clause of the Act 1621, without Participation of the Fraud, by the Creditors receiving Payment from the common Debitor. 7th June 1715, *Tweidie* against *Din*.

BATTERY.] Beating a Burges during a Process against the Town, found not sufficient to infer the Penalty of the Act of Parliament, a-
nent *Battery during the Dependence of a Process*. 19th January 1715, Town of *Peebles* against *Cringiltie Younger*.

Z z

BILL

BILL OF EXCHANGE.] Found duly Negotiated by a Merchant, tho' it was only Protested the 4th Day after it fell due, and not profered back to the Drawer. 1st February 1715, *Johnston* against *Murray*.— A Bill not being Protested against the Acceptor, nor Diligence done thereon for Payment during 5 Years; it was found, That the Indorser was only to be considered as a common Assigney. 18th February 1715, *Murray* against *Grierfon*.— A Bill not being for Money, but a *Salt Bill*, and not Protested, nor Diligence done thereon for five Years and some Months, the Indorsee was found only to be considered as a common Assigney. 19th February 1715, *William Douglass* against Colonel *Erskine*.— A Bill presumed to have been for *Value received*, from the Person to whom it was payable. 22d July 1715, *Ker* against *Brown*.

BLANK WRIT.] A Translation to a Bond being taken by one of a Company of Merchants Blank, and so found among his Papers after his Decease, was nevertheless found to have been purchased with the Money of them all. 18th November 1714, *Irvine* against *Charteis*.— An Assignment Blank in the Assigney's Name, being in a Person's Custody, and he transferring the same, but letting it still remain Blank, and having himself nevertheless uplifted the Sum assigned; 'twas found, That the Translation did instruct the Assignment to have belonged to him, and therefore to the Person in whose Favours he made the Translation, and that he could not warrantably uplift the Money himself. 16th June 1715, Lord *Alexander Hay* against *Inglis*.

BONA FIDES.] Payment presumed to have been made *Bona Fide*, tho' made by a Vintner to a Wine Merchant, by Order of a Couper, who had bought the Wine, not from that Merchant, but from others. 14th January 1715, *Eccles* and *Craigie* against *Roberton*.

BONÆ FIDEI POSSESSOR.] Found, That a Lady's Intromissions with the Rents of her deceased Husband's Lands, for Aliment and Education of the apparent Heir, were *Bona Fide*, till she was interrupted by a Citation in an Action of Mails and Duties against the Tenants, at the Instance of an Adjudger. 19th July 1715, *Miln* against Lady *Galram*.

BOND OF CORROBORATION.] The Granter of such a Bond found not to be in the Terms of the Act of Parliament 1695, anent the Seven Years Prescription of Cautionry. 9th February 1715, *Rutherford* against *Scot*.

BOND OF PROVISION.] Tho' it bear (*secluding Assignies*) when granted to a Daughter, yet she was found not to be thereby precluded from assigning the same to her Husband, in a Contract of Marriage. 17th December 1714, *Strachan* against *Dunbar*.— A common Debtor being insolvent the Time of his making a Bond of Provision to his Daughter, other Creditors were preferred before the said Bond. 10th February 1715, *Laird Blackbarony* against Lord *Pitmedden*.

BURGAGE LANDS.] *Vide* Courtsy.

BY-LAWS.] *Vide* Deacon-Conveener.

C.

CAUTIONER.] A Party being Cautioner for another, and having wrote to the Creditor a Letter after the Term of Payment, craving Delay, and promising punctual Payment at a Day; it was found, That the 7 Years Prescription by the Act 1695, doth in this Case run, not from the Date of the Bond, but from the Date of the Letter. 19th January 1715, *Gordon* against Sir *Archibald Campbell*.

Found, That the Act 1695, anent the 7 Years Prescription of Cautionry, statutes only in the Case where Sums fall due, for which Diligence could be used within 7 Years. 4th February 1715, *Borthwick* against *Crawford* and *Boid*.— A Cautioner having paid the Debt, in a Competition betwixt him and the Donator to the principal Debtor's Bastardy, the Penalty of the Bond was restricted to the Sum really paid out by the Cautioner to the Creditor. 22d February 1715, *Bowlis* against Sir *John Johnston*.

CAUTIONERS IN SUSPENSIONS.] Found not to fall under the Act 1695, anent the 7 Years Prescription. 4th February 1715, *Hope* against *Foulis*.

CIRCUMVENTION.] A Person being weak in Judgment, but neither Furious nor Fatuous, granting general Dispositions, (tho' with several Reservations in his own Favours) the Writs were reduced upon divers Facts and Qualifications proven. 1st February 1715, *Graham* against *Blair*.

CLAUSE IRRITANT.] A Clause Irritant in a Contract, not being Penal, and being incurred; 'twas found, That it took Place even without Declarator. 14th December 1714, *Dundas* against *Murrays*; and 21st January 1715, *Inter eosdem*.

COMPENSATION.] A Relief being Executrix to her Husband, and Tutrix Testamentar to her Son, after Marriage to a second Husband, charging the Factor for bygone Annuities due by Decrees, altho' by Receipts produced she appeared to be Debtor, yet the Compensation was repelled, as being an illiquid Sum, which cannot compensate a Liquid. 9th Febr. 1715, *Gordon* against *Gordon*. *Vide* Aliment, *Vide* Trust.

COMPETENT AND OMITTED.] Several Reasons of a Suspension repelled, as being Competent and Omitted. *Vide* the Decision it self. 19th July 1715, Dame *Barbary Jaffrey* against *Scot* of *Brotherton*.

COMPETITION.] A Person granting Wadset with Reversion, not only with Respect to the Sums then due, but all Sums that thereafter might be due, or whereto the Creditor or his Heirs might thereafter have Right; 'twas found nevertheless, That this Right was not preferable for Debts, which were not in the Creditors Person the Time that some other Creditors their Insestments were made Publick. 19th January 1715, *McDouall* and *Stevenson* against Sir *John Rutherford*.— A Creditor having Adjudged, and also having a Disposition to several Debts, &c. from the common Debtor; 'twas found in a Competition with another Creditor, (the Ground of whose Debt was meerly Lucrative) That he behaved

behoved to Compt for such of the Debts in the Disposition, whereof the Instructions came to his or his Predecessor's Hands, to extinguish his Adjudication. 17th February 1715, *Nicolson* against Sir *James Sharp*.— Creditors Arresting in Tenants Hands, and pursuing Furthcoming against them and the Masters Chamberlain, who, notwithstanding the Arrestment, had uplifted the Sums, and a Factor constitute by the Lords at the Instance of other Creditors, insisting not only for the current Rents, but for Bygones, to which also his Commission entitled him: The Arresters were preferred to the Lords Factor. 22d February 1715, *Gellie* against Creditors of *Monimusk*. *Vide Bankrupt, Vide Preference.*

COMPT-BOOK.] The Title of a general Assigney to a Compt-Book, tho' not Confirmed, was sustained, he Confirming before Extraet. 13th July 1715, *Douglass* against *Cochran*.

COMPRISING.] A Comprising being restricted by Contract to a lesser Sum, and there being a posterior Contract also, whereby Part of the Lands are Wadset, redeemable for the Sums in the Comprising, and Possession conform, both Contracts being within the Legal; and a Person having purchased the Comprising for the Sum in the Wadset, and not for a Sum equivalent to the comprised Lands; 'twas found, That the Comprising was still redeemable. 21st June 1715, Sir *George Innes, &c.* against *Chalmers*.

CONTEMPT OF AUTHORITY.] A Party was Fined for continuing to build a Mill, after a Suspension intimate; and the Going of the Mill was stopped for a Time, till the principal Cause should be discust. 26th January 1715, *Erromp* against Viscountess of *Kenmure*.

CONTRACT OF MARRIAGE.] In a Competition betwixt the Daughter of a first Marriage and the Relict of a Second, who both of them had Adjudged the Defunct's Lands; the First for her Provision in her Mother's Contract of Marriage, and the Other for her own Liferent Provisions in her Contract; and she having also gotten some other Rights from her Husband *stante Matrimonio*, 'twas found, That these posterior Deeds were imputable in Payment of what she Adjudged for, unless she could instruct a separate Onerous Cause. 2do. The first Contract, tho' Post-nuptial, was found Irrevocable, and yet that the Husband being Fiar, might do rational Deeds. And 3tio. That the Liferent Provision in the second Contract was a rational Deed. 12th November 1714, *Blair* against *Hamilton*.— A Wife being Minor, and having in a Post-nuptial Contract disposed her Heritage to the Husband and herself in conjunct Fie and Liferent, and revoking after his Death, and disposing the Subject to a 2d Husband: In Competition betwixt him and the first Husband's Creditors, 'twas found, That the first Husband was Fiar by Conception of the first Contract; but Minority and Lesion were sustained, unless the first Husband's Creditors would offer to prove, that he had a Stock the Time of the Contract, for securing the Wife in a Liferent, tho' afterwards his Means failed. *Eodem Die*, *Greenhill* and Others, against *Stuart*.— A Wife being provided in her Contract to the Half of the tree Gear at the Husband's Death, and he having disposed to 3d Parties an

Heritable Bond, but with Liberty to alter; and thereafter having also innovate the Debt, and taken a personal Bond for the Sum, which also he Indorsed (like a Bill of Exchange) to the said 3d Party; 'twas found, That the new Bond being Moveable, and granted to the Defunct in his own Lifetime, and not habily transmitted to the said 3d Party for an Onerous Cause, fell under the Division, conform to the Clause in the Contract of Marriage; and that the Relict had Right to the Half of the Sums contained in the said Bond. 11th June 1715, *Farquhar* against *Hunters*.

CONTRAVENTION OF WARRANDICE.] A Party being bound in Warrandice against an Infeftment of a Person *Nominatim*; and it not appearing thereafter, that ever such a Person or such an Infeftment there was, but that there was one at another Party's Instance, not purged, the Warrandice was found not to be incurred. 2d February 1715, *Ogilvy* against *Lefly*.

CORROBORATION.] A Bond of Corroboration being granted, and delivered by a 3d Party to a Creditor, and he some Days thereafter returning it, as not being pleased therewith, it was found, That the Creditor might make use of this Bond, or repudiate the same at his Pleasure. 2d February 1715, *Grant* against *Donaldson*.

COURTESY.] Not found due in Burghage Lands. 16th June 1715, *Gordon* against *Clark*.

CREDITORS.] A Father having granted a general Disposition to his only Son, and thereafter paying a Debt as Cautioner for another Person, and taking Assignation thereto in his own Name, and thereon adjudging the principal Debtor's Estate; in a Competition betwixt the Creditors of the Father and those of the Son, for this Subject; it was found relevant to prefer the Son's Creditors, that the Debt was paid out of his Estate. 12th November 1714, Creditors of *Orbiston Elder* and Younger Competing.

CURATOR.] Found, That notwithstanding the Act 1696, anent 10 Years Prescription of Tutor or Curators Accompts, yet a Curator, tho' long after Majority, and after the 10 Years were elapsed, cannot pursue for a Debt formerly due by the Minor, *ante redditus Rationes*; from the Presumption, That *Intus habet*. 9th December 1714, *Baillie* against The Laird of *Lamington*.

D.

DEACON-CONVEENER.] Found, That the Conveener and the other Deacons in a Burgh, have no Power to Hold or Fence Courts; but yet that they have Right to make By-Laws for regulating their own Corporations. 17th June 1715, Magistrates of *Aberdeen* against The Deacon-Conveener and Others.

DEAN OF GILD.] In a Competition betwixt real prior Creditors of the Defunct, and a 2d Husband of the Relict Liferentrix of Houses, who was in Possession, and had also Adjudged for Expences of Reparations, allow'd him by the Dean of Gild's Decreet; it was found, That his Intromissions were imputable in the first Place in Satisfaction of the said Decreet, and Adjudication following thereupon. 19th November 1714, *Shearers* against *Fleming*.

X x 2

DIS-

BILL OF EXCHANGE.] Found duly Negotiated by a Merchant, tho' it was only Protested the 4th Day after it fell due, and not profered back to the Drawer. 1st February 1715, *Johnston* against *Murray*.— A Bill not being Protested against the Acceptor, nor Diligence done thereon for Payment during 5 Years; it was found, That the Indorser was only to be considered as a common Assigney. 18th February 1715, *Murray* against *Grierison*.— A Bill not being for Money, but a *Salt Bill*, and not Protested, nor Diligence done thereon for five Years and some Months, the Indorsee was found only to be considered as a common Assigney. 19th February 1715, *William Douglass* against Colonel *Erskine*.— A Bill presumed to have been for *Value received*, from the Person to whom it was payable. 22d July 1715, *Ker* against *Brown*.

BLANK WRIT.] A Translation to a Bond being taken by one of a Company of Merchants Blank, and so found among his Papers after his Decease, was nevertheless found to have been purchased with the Money of them all. 18th November 1714, *Irvine* against *Chartaris*.— An Assignment Blank in the Assigney's Name, being in a Person's Custody, and he transferring the same, but letting it still remain Blank, and having himself nevertheless uplifted the Sum assigned; 'twas found, That the Translation did instruct the Assignment to have belonged to him, and therefore to the Person in whose Favours he made the Translation, and that he could not warrantably uplift the Money himself. 16th June 1715, Lord *Alexander Hay* against *Inglis*.

BONA FIDES.] Payment presumed to have been made *Bona Fide*, tho' made by a Vintner to a Wine Merchant, by Order of a Couper, who had bought the Wine, not from that Merchant, but from others. 14th January 1715, *Eccles* and *Craigie* against *Robertson*.

BONÆ FIDEI POSSESSOR.] Found, That a Lady's Intromissions with the Rents of her deceased Husband's Lands, for Aliment and Education of the apparent Heir, were *Bona Fide*, till she was interrupted by a Citation in an Action of Mails and Duties against the Tenants, at the Instance of an Adjudger. 19th July 1715, *Miln* against Lady *Galraim*.

BOND OF CORROBORATION.] The Granter of such a Bond found not to be in the Terms of the Act of Parliament 1695, anent the Seven Years Prescription of Cautionry. 9th February 1715, *Rutherford* against *Scot*.

BOND OF PROVISION.] Tho' it bear (*secluding Assignies*) when granted to a Daughter, yet she was found not to be thereby precluded from assigning the same to her Husband, in a Contract of Marriage. 17th December 1714, *Strachan* against *Dunbar*.— A common Debitor being insolvent the Time of his making a Bond of Provision to his Daughter, other Creditors were preferred before the said Bond. 10th February 1715, *Laird Blackbarony* against Lord *Pitmedden*.

BURGAGE LANDS.] *Vide* Courtsy.

BY-LAWS.] *Vide* Deacon-Conveener.

C.

CAUTIONER.] A Party being Cautioner for another, and having wrote to the Creditor a Letter after the Term of Payment, craving Delay, and promising punctual Payment at a Day; it was found, That the 7 Years Prescription by the Act 1695, doth in this Case run, not from the Date of the Bond, but from the Date of the Letter. 19th January 1715, *Gordon* against Sir *Archibald Campbell*.— Found, That the Act 1695, anent the 7 Years Prescription of Cautionry, statutes only in the Case where Sums fall due, for which Diligence could be used within 7 Years. 4th February 1715, *Borthwick* against *Crawford* and *Boid*.— A Cautioner having paid the Debt, in a Competition betwixt him and the Donator to the principal Debitor's Bastardy, the Penalty of the Bond was restricted to the Sum really paid out by the Cautioner to the Creditor. 22d February 1715, *Bowlis* against Sir *John Johnston*.

CAUTIONERS IN SUSPENSIONS.] Found not to fall under the Act 1695, anent the 7 Years Prescription. 4th February 1715, *Hope* against *Foulis*.

CIRCUMVENTION.] A Person being weak in Judgment, but neither Furious nor Fatuous, granting general Dispositions, (tho' with several Reservations in his own Favours) the Writs were reduced upon divers Facts and Qualifications proven. 1st February 1715, *Graham* against *Blair*.

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CONTEMPT OF AUTHORITY.] A Party was Fined for continuing to build a Mill, after a Suspension intimate; and the Going of the Mill was stopped for a Time, till the principal Cause should be discusst. 26th January 1715, *Eromp* against Viscountess of *Kenmure*.

CONTRACT OF MARRIAGE.] In a Competition betwixt the Daughter of a first Marriage and the Relict of a Second, who both of them had Adjudged the Defunct's Lands; the First for her Provision in her Mother's Contract of Marriage, and the Other for her own Liferent Provisions in her Contract; and she having also gotten some other Rights from her Husband *stante Matrimonio*, 'twas found, That these posterior Deeds were imputable in Payment of what she Adjudged for, unless she could instruct a separate Onerous Cause. 2do. The first Contract, tho' Post-nuptial, was found Irrevocable, and yet that the Husband being Fiar, might do rational Deeds. And 3tio. That the Liferent Provision in the second Contract was a rational Deed. 12th November 1714, *Blair* against *Hamilton*.— A Wife being Minor; and having in a Post-nuptial Contract disposed her Heritage to the Husband and herself in conjunct Fie and Liferent, and revoking after his Death, and disposing the Subject to a 2d Husband: In Competition betwixt him and the first Husband's Creditors, 'twas found, That the first Husband was Fiar by Conception of the first Contract; but Minority and Lesion were sustained, unless the first Husband's Creditors would offer to prove, that he had a Stock the Time of the Contract, for securing the Wife in a Liferent, tho' afterwards his Means failed. *Eodem Die*, *Greenhill* and Others, against *Stuart*.— A Wife being provided in her Contract to the Half of the tree Gear at the Husband's Death, and he having disposed to 3d Parties an

Heritable Bond, but with Liberty to alter; and thereafter having also innovate the Debt, and taken a personal Bond for the Sum, which also he Indorsed (like a Bill of Exchange) to the said 3d Party; 'twas found, That the new Bond being Moveable, and granted to the Defunct in his own Lifetime, and not habily transmittit to the said 3d Party for an Onerous Cause, fell under the Division, conform to the Clause in the Contract of Marriage; and that the Relict had Right to the Half of the Sums contained in the said Bond. 11th June 1715, *Farquhar* against *Hunters*.

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D.

DEACON-CONVEENER.] Found, That the Conveener and the other Deacons in a Burgh, have no Power to Hold or Fence Courts; but yet that they have Right to make By-Laws for regulating their own Corporations. 17th June 1715, Magistrates of *Aberdeen* against The Deacon-Conveener and Others.

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X x 2

DIS-

DISCUSSING.] A Creditor pursuing an Heir-male before the Heir of Line, the Lords sustained the Condescendance on an Estate to which the Heir of Line might succeed; it having been objected, That the Benefit of Discussing only took Place, where the Heir-male could condescend on such an Estate. 25th January 1715, *Alan* against The Earl of *Lauderdale*.

DISTRESS.] A Purchaser being allowed to retain Part of the Price, till an Infestment were purged, is now, after running of the long Prescription, found liable to pay up the Ballance, upon his getting a Discharge with absolute War-randice, and Caution to be relieved of that Infestment, and the Cautionry to subsist for 10 Years, (in case there should be no Distress within that Time) from the Date of Payment. 22d February 1715, *Marjoribanks* against The Laird of *Dirlton*.

E.

ENTRY.] A Vassal being bound by his Charter to double the Rent *primo Anno Introitus*; 'twas found, That this Double was not over and above the ordinary Year's Rent, since that would be properly a Triple. 23d June 1715, *Symson* against The Laird of *Tilliboll*.

EXECUTOR.] The Executor of a Life-renter preferred to the bygone Rents of the Life-rented Lands, tho' it did not yet appear that there were no Debts resting by the Defunct; in which Case the Heir, (who compeared for his Interest) would be liable *in subsidium*. 22d July 1715, *Home, &c.* against *Trotter* and Sir *Robert Home*.

EXECUTION.] A Bond being granted by the Officers of a Regiment, and the same assigned to another Man, the Execution of the Intimation thereof at the Mercat Cross of *Edinburgh*, Pier and Shore of *Leith*, was sustained; notwithstanding that, 1mo. The Bond referred to in the Intimation, is therein said to be granted by the Officers of the Foot Guards; whereas they belonged to another Regiment. 2do. Notwithstanding the Bond carried the Colonel's Name as one of the Obligants, who nevertheless did not subscribe. 3tio. Tho' all the Officers were mentioned in the Execution of Intimation, as bound; whereas 7 only subscribed the Bond. 4to. Notwithstanding the Sum, as mentioned in the Execution of Intimation, was greater than the Sum in the Bond assigned. 5to. Notwithstanding the Designation of the Sum was not in the Intimation, conform to each particular Officer's Debt, as mentioned in the Bond assigned, — yet the said Execution of Intimation was found Null, in regard it did not bear Production of the Assignment intimated. 10th November 1714, Sir *Robert Forbes* against Commissioners of *Equivalent*, and *Watson*.

EXHIBITION.] Found, That a Substitute in a Taillie may insist against the Granter for Exhibition thereof; but reserving all Defences against Registration, or to any other Legal Effect, as accords. 25th Jan. 1715, *Houston* Younger, against Sir *John Schaw*.

EXHIBITION AD DELIBERANDUM.] In an Exhibition *ad Deliberandum*, found, That the Defender, tho' not in *familia defuncti*, ought to Exhibit all Writs in his Hands, whether Infestment had followed

thereon, or not. 30th June 1715, *Spark* against *Barclay*.

EXPENCES OF PLEA.] A Person having accepted a Bill for a Quantity of Salt, and drawn a Money Bill for the Value thereof, payable to a 3d Party, the Acceptor of the Money Bill having also paid the same upon Distress, and charging for the Salt Bill; after discussing of a Suspension, where the Letters were found orderly proceeded, it was found, (upon Application for Expences) That the Suspender was liable for the Annualrent of the Money Bill accepted by the Charger, from the Time he paid the same; and that in Lieu both of Damages and Expences. 9th December 1714, *Lesly* against *Robertson*. — One of many Creditors pursuing the common Debtor's Relief, (as having got a Disposition from her Husband on Trust for Payment of his Debts) and recovering Sentence against her, but nothing thereon Extracted; 'twas found, That the other Creditors thereafter compearing, the said first Creditor was preferable for his Expences, to be paid out of the first and readiest of the Subject; but that the whole Creditors should come in *pari passu*. 30th July 1715, Creditors of *Calderwood* against *Borthwick*.

F.

FACTOR.] A Person being constitute, by one going Abroad, Factor to uplift Rents of Houses for Payment of Creditors, which Factory was to continue only for 13 Years; and the Granter having also before his Departure Taillied the said Houses, and allowed a Factor Fee to the Factor: After many Years, (the Granter being dead) upon Application made by the Heirs of Entail, and their presenting another Factor who was to serve *Gratis*, the present Factor's Salary was stopped, but he allow'd to continue his Possession, upon his finding Caution to Compt to all Parties having Interest, and to do Diligence; and in case of his Refusal, a Factor ordained to be Nominate in common Form. 17th December 1714, *Drummond* and *Learmont* against *Sinclair*. Vide 16th June 1715, *Hillow* against *Maxwel*.

FACTOR FEE.] Found, That a Chamberlain's Salary or Fee due for his Service preceeding the last 3 Years before Citation in a Process for recovering them, do Prescribe *quoad modum probandi*, otherwise than by Writ, or Oath of Party. 3d December 1714, *Baillie Smith's* Relief and Children against The Earl of *Winton*. — A Salary allow'd to a Party for assisting a Person of Quality's Brother in managing the Estate during his Lordship's Absence out of the Country, tho' the said Under-manager had no Commission; but no Salary was allow'd him for his Management after that 2d Brother's Decease, even for his Service after the Master's Return, having never in all that Time got a Commission. 8th February 1715, *Inter eosdem*.

FRAUD.] Found, That a Man's being induced by Fraud to sell Wares to one who was Bankrupt, was relevant to reduce the Sale. 18th January 1715, *Main* against *Maxwel*. — Item, That the Buyer having granted a general Disposition to his Creditors prior to the Sale, was a sufficient Instruction of the Fraud. *Eodem Die*, *Inter eosdem*. — Found, That when a Party

Party fraudulently induces another to sell to him, when he knew himself *Lapsus*; and when a Creditor of the Bankrupt arrests in a third Party's Hands, the Fraud is understood to be *in Rem*, and not *in Personam* only of the Bankrupt; and that such a Creditor is not in the Case of third Parties purchasing on Payment of a Price. 4th February 1715, *Inter eosdem*.— A Bankrupt, before his Insolvency was known, having contracted a Jointure to his Son's Spouse; upon Application of his Creditors after his Breaking, the Lords refused to restrict the Jointure, and found her Provision onerous and suitable; her Tocher having been 8000 Merks, and the Jointure 2000, restricted also to 100 *Lib. Sterling* in case of Children of the Marriage. 17th February 1715, Creditors of Mr. *John Menzies* against Doctor *Menzies* and his Lady.

H.

HEREZELD.] Found, That there is no Herezeld due by a Feuair, but only by Tenants. 23d June 1715, *Symson* against *Halliday*.

HOLOGRAPH WRIT.] A holograph Writ having run the Course of the 20 Years Prescription, 'twas found, That when pursued upon thereafter, not the Verity of the Debt, but only of the Deed, and the Truth of the Subscription, was probable by the Defender's Oath. 28th July, 1715, Earl of *Levin* against *Arnot*.

HOMOLOGATION.] A Nullity being proponed against a Bond, yet the Lords sustained the Acts of Homologation by Payment of the Annualrents, and the Half of the principal Sum, and by raising Suspension for the rest, and founding upon Reasons for further Payment, to support the Bond as a valid and probative Writ. 17th February 1715, *Sinclair* against *Sinclair*.

I.

IMPROBATION.] In an Improbation, Offer being made by one of the Parties called, to show the Place in the Records where the Writs called for from him were insert, and no Answers made for the other Side, the saids Writs were holden as produced, unless the Pursuer would insist on special Reasons of Reduction and Improbation. 28th July 1715, Sir *Lawrence Mercer* Supplicant.

IMPROVEMENTS.] A Vassal who had greatly improven his Feu Lands, being to pay his Entry, 'twas found, That the present Rental (not that which was when the Purchase was made) was the Rule. 27th July 1715, Gubernators of *Heriot's Hospital* against *Hepburn* of *Bearford*.

INFERIOR JUDGE.] Found unwarrantable in an Inferior Judge, to refuse a Sift of Advocation, tho' presented only in the Afternoon of the last Day of his Session, the Judge and Clerk being officiating; but the Sifts being expired before the Judge his subscribing the Sentences, found sufficient to free him from any other Penalty, than the Expences of the Complaint. 21st January 1715, *Coupar* against The Sheriff-Depute of *Pertb.*

INHIBITION.] Found Null, because the Summons whereupon it was founded, was not

execute the Time of raising the Inhibition. 22d November 1714, Creditors of *Rosehill* against Creditors of *Thomson*.— Found Null, because the Execution thereof at the Pier and Shore of *Leith*, did not bear 3 Oyesles, nor publick Reading thereof. 22d February 1715, Sir *John Clark* against *Preston*.— As also, another Nullity sustained, viz. That the Execution at the Mercat Cross of *Edinburgh*, was not Marked and Signed by the Clerk, in the Terms of 119 *Alt. Parl.* 7. Ja. VI. *Eodem Die, Inter eosdem*.

INTIMATION.] Vide Execution.

INSTRUMENT.] A Party who was bound to deliver up a Writ, being required thereto under Form of Instrument; but the Notar and instrumentary Witnesses being dead, it was found, That the Instrument (after a long Tract of Years, but within Prescription) was not probative of it self, unless it were Adminiculate by some Document, or other Probation. 24th June 1715, *Glass* against *Stuart*.

INTROMISSION.] A Creditor found accountable for Intromissions from a certain Term, *ad hunc effectum*, only for extinguishing his Rights, but not for Repetition of Superintromissions. 21st January 1715, Colonel *Erskine* against Sir *George Hamilton*.

INTRUSION.] An Action of Intrusion found to prescribe as to the violent Profits, not being intended within 3 Years, tho' a summary Complaint was exhibit and insisted in before the Lords, against the Defender, shortly after the Fact. 17th February 1715, Sir *Archibald Sinclair* against Marquis of *Annandale*.

JOINTURE.] Found, That a Post-nuptial Bond of Provision to a Wife, tho' lying by the Granter the Time of his Decease was not revokable, except in so far as it exceeded a competent Provision. 18th February 1715, Lord and Lady *Lindoris*, against Sir *James Stuart*.

JUS MARITI.] Found, That a Father may qualify a Right to his Daughter granted during her Marriage, to the Exclusion of the *Jus Mariti*, tho' by her Contract of Marriage she was to be a Bairn in the House. 4th February 1715, *Brown* against *Pyle*.

JUSTICE OF PEACE.] Found, 1mo. That 3, and not 2, are a *Quorum*. 2do. That except in case of Violence or Breach of the Peace, they cannot hold a Court in *Christmass* Vacance. 3tio. That when a Shire is divided into Parts, they may proceed, tho' either of the Parties live in distinct Districts of the Shire: But found, That tho' any of these 3 Particulars be transgressed, yet the Error gives no Foundation for Damages against them. 4to. Found, That in case of Intrusion, or the like pursued before them, the Pursuer's Title needs not be Libelled, but that his Possession ought to be proven, before the Justices can pronounce Sentence. 5to. That Defenders before them ought to have a competent Time to Answer, according as the Exigence of the Matter requires, and Allowance of a Procurator to compar. 6to. That Justices may summarily Imprison, when the Cause requires, till Payment of the Fine. 9th November 1714, The Laird of *Fullarton, &c.* against The Earl of *Kilmarnock, &c.*— An unwarrantable Decreet being pronounced by the Justices, they were nevertheless assailed from Damages, but the Plain-

tiff found liable for the same, as an *Improbus litigator*. 19th February 1715, *Inter eosdem*.— Found, That a Warrant granted by a Justice of Peace, for imprisoning a married Wife for a Civil Debt, was Illegal; and therefore that he was lyable in Expences and Damages. 18th February 1715, *Pitcairn against Deans and Preston*.

L.

LESION.] See *Minority*.
LIS ALIBI PENDENS.] The dilatory Defence of *Lis alibi pendens* sustained, only because the Pursuer had compeared in another Court, where the Defender was pursued by another Competitor for the Subject; and barely alledged, That the Matter stood under Arbitration betwixt him and the Defender. 21st July 1715, *William Gordon against William Elliot*.

M.

MANSE.] Found, That a Minister's proving his and his Predecessor's Possession, and their being in Use to receive from the Parish a Sum of Money for House-Rent, in Lieu of his Manse, (tho' he produced no other Title) did subject the Parish in a Payment thereof for Bygones, and in Time coming. 22d January 1715, *Ferguson against The Town of Aberbrothock*.

MINORS.] Found, That a Minor's Stock, tho' never so small, cannot be diminished for his Aliment by the Curator. 28th June 1715, *Duncanson against Duncanson*.— Found, That a Curator may imploy the Minor's Stock, in joining him with a Person held and repute of Knowledge and Reputation in that Trade, whatever the Event prove. *Eodem Die, Inter eosdem*.

MINORITY AND LESION.] A Wife having revoked a Deed in Favours of her Husband, (after his Decease) and intended Reduction before Diligence done at the Instance of his Creditors; 'twas found, That the Priviledge of Restitution upon *Minority* and *Lesion*, was competent to her even after Expiration of the *Quadriennium utile*, she having been *Vestita Viro*, and therefore *non valens agere*. 14th December 1714, *Greenhill and Others, against Stuart*. *Vide, Quadriennium utile*.

MOVEABLE DEBT.] A Husband found liable for a moveable Debt due by his Wife before the Marriage, whether he were *Lucratus* or not. 19th February 1715, *Inglis against Harvie and her Husband*.

N.

NAUTE CAUPONES, &c.] A Person coming to an Inn-keeper's House at Mid-day, only to Bait, and without Design of longer Stay: Found, That the Inn-keeper was liable upon the *Edict*, for Money taken out of a Leathern Jagg upon the Horse's Back in the Stable, tho' neither the Horse nor Money were delivered to him, but his Hoftler led in the Horses to the Stable. 14th June 1715, *Chisholm of Comer, against Mr. David Fenton*.

NEGOTIORUM GESTIO.] A Sum of Money being advanced by the Manager of a Person of Quality's Estate, to one of his Friends, who, by Advice of the other Relations of the

Family, went Abroad to acquaint him with the State of his Affairs, and sollicite his Home-coming; the Master himself was after his Return found bound to allow the Money so advanced, tho' the Friend's Journey proved at that Time ineffectual. 1st December 1714, *Baillie Smith's Children against the Earl of Winton*.— But was thereafter affoillied from the Annualrents of the Sum. 18th January 1715, *Inter eosdem*.

NOMINATION.] A Party disposing a Wadset to another, which failing, to any of a 3d Party's Children their own Father should Nominate; 'twas found, That the Father had not only Power to make the Nomination of any of his Children he pleased; but to qualify that Nomination. 25th January 1715, *Seton against The Lord Pitmedden*.

NON-ENTRY.] In a Declarator of Non-entry, this Quality was adjected, purgable on Payment of the bygone Feu-duties, and a Year's Rent, as a singular Successor, at the Time of the Vassal's Entry: And in case of his Neglect to obtain himself entered, he was found liable for the whole Mails and Duties. 24th June 1715, *Heriot's Hospital, against Hepburn of Bearford*.

P.

PART AND PERTINENT.] A Moss found Part and Pertinent of Lands Contiguous to it, upon several Qualifications. 17th December 1714, *Crawford against Crawford*.

PASSIVE TITLES.] Found, That Prescription cannot be proponed, without acknowledging the Passive Titles. 23d June 1715, *Forret against Representatives of Carstairs*.

PENALTY.] A Penalty adjected to a Contract of Marriage, refused to be sustained. 21st January 1715, *Young against Irvine*.

POSSESSION.] The Presumption, That Possession presumes Property, found Elidable by several other Presumptions. 17th Febr. 1715, *Warrander and Others, against Alexander and Others*.

PREFERENCE.] A Person's Estate being Adjudged, and he thereafter agreeing with the Creditor to pay him at certain Terms; but not keeping his Days, others to whom the Creditor was Debtor, Arresting, and another Adjudging, the Adjudger was preferred to the Arresters. 17th February 1715, *Watson against Thomson and Tod*.

PRESCRIPTION.] See *Passive Titles*.

PROTUTOR.] A Defence of Payment to a Stepfather, as Protutor to a Minor, Repelled; unless it were alledged that the Money was applied to the Minor's Behoof. 20th July 1715, *Benjamin Allan against Hamilton of Little-Earnock*.

PROVISION.] A Party by a holograph Writ appointing his two Sons to succeed to his Heritage, and failing of them, his four Daughters; with a Clause of Provision to the younger Children; and also another Clause, ordaining another Sum to be paid to his Female Children in case the Males should decease, and none of the saids Females succeed to him as Heirs; but the Sons succeeding, that the first Provision was in Satisfaction to the Daughters of all they could ask: One of the Persons being Infest, and disposing to the eldest Sister, and she to the Third, passing

passing by the Second, the Defence against the said Second, insisting for her proportional Share of the 2d Sum, was sustained in these Terms, viz. That the Son succeeded to his Father, either by Service, or Precept of *Clare constat*; and that the eldest Sister succeeded to her Brother, either as Heir, or by singular Titles. 8th February 1715, *Ker* against *Kers*.

Q.

QUADRIENNIUM UTILE.] Found, That the Privilege of Restitution upon Minority and Lesion, was still competent to a Wife, tho' she had not insisted within the *Quadriennium*, to restore her against Deeds done in Favours of the Husband, and others deriving Right from him; she having been *Vestita Viro*, and immediately after Dissolution of the Marriage, Revoking, and intenting Reduction before Diligence done at the Instance of her Husband's Creditors. 16th February 1715, *Greenbills* and Others, against *Stuart*, &c. See *Minority* and *Lesion*.

QUOD APPROBO NON REPROBO.] The Lords found, That a Party might found on the Concession and Acknowledgment in a Paper granted by the contrary Party; and at the same Time might deny the other Facts (which made against him) alledged in the said Paper. 22d July 1715, *Sir Patrick Home*, against *The Earl of Home*.

R.

RANKING.] A Creditor and Purchaser being preferable on several distinct Lands, was allowed to lay his whole preferable Debts, so as to exhaust the Price of one particular Barony, thereby to get Payment of his other Debts, affecting other Subjects, tho' another competing Creditor was Ranked upon the Barony after him, but not Ranked upon the other Subjects. 22d February 1715, *Brigadier Preston* against *Colonel Erskine*.— In a Ranking of Creditors, the Children of the first and second Marriage of the common Debtor, who were provided to Sums in their respective Mothers Contracts, were allowed to come in *pari passu* proportionally, effecting to their respective Sums. 6th July 1715, *The Daughters of Auchinvole* competing.

REGISTRATE PROTEST.] A Bill being unwarrantably Protested and Registrate, even after Six Months, the Letters were not suspended *simpliciter*, but the Decree turned to a Libel; and found, That there was no Necessity of a new Libel. 30th July 1715, *Mackready* against *Crawfurd*.

REMOVING.] The Lords Decerned in a Removing; Altho, 1mo. The Warning was only on the 5th of April, and so not 40 free Days before the Term. 2do. Altho' the Warning was execute at the Kirk Door, before it was execute against the Defenders. 3tio. Tho' the Execution did not bear on what Days the Copies were left on the Ground. 8th February 1715, *Dutchess of Balcleugh*, against *Davidson* and Others.— A Pursuer's Title in a Removing being an Infeftment on a Precept of Sasine, gran-

ted by his Father as his Administrator, the Summons and Warning nevertheless was sustained *ad hunc effectum*, to make the Defender liable to remove the next Term, but not for Violent Profits. 10th February 1715, *Hamiltons* against *Boswel*.

RENUNCIATION.] A Contract of Marriage being conceived in these Terms, That the Wife should not renounce any Part of her Jointure without Consent of her Father, &c. in Writing; and having, nevertheless, in her Widowity, under her Hand *de facto*, renounced Part of it in Favours of her Son, and delivered the Writ to her Father, as Tutor to the Child; 'twas found, That she could not Renounce *cum Effectu*, without her Father's Consent in Writing, tho' he accepted the Renunciation from her as Tutor foresaid. 26th July 1715, *Dallas* against *Dallas*.

S.

SANCTUARY.] The Castle of *Edinburgh* found no Sanctuary to hinder Execution of his Majesties Letters. 15th December 1714, *Mackay* against *Campbell* and *Stuart*.— Yet the Deputy-Governour was assailed from a Complaint against him for stopping Execution of a Caption there; but he nevertheless ordained to deliver up the Party to a Messenger, in case only of the said Party's returning to the Castle, and his being there the Time of Demanding. *Eodem Die, Inter eosdem*.

SEA GREENS.] Which in Spring Tides are intirely overflown, found not *inter Regalia*, and therefore need not be established as a separate Fie, but that they may belong to the Neighbouring Heritors, as Part and Pertinent of their Lands. 25th November 1714, *Bruce* against *The Laird of Ralshybill* and Others.

SASINE.] Found, That with respect to a Son's Wife, to whom the Father a Bankrupt, was bound for Implement of her Contract of Marriage, the 60 Days relating to Deeds made by a Bankrupt, commence from the Date of the Sasine, and not from the Date of the Registration. 17th February 1715, Creditors of *Mr. John Menzies*, against *Dr. Menzies* and his Lady.

SERVICE OF AN HEIR.] An Apprising being disposed to a Person; whilk failing, to his eldest Son *Nominatim*, he predeceasing; and then the Son who was never served Heir to him; 'twas found, That the Right was not after the Father's Decease fully vested and settled in the Person of the Son, without Necessity of a Service. 21st January 1715, *Hamilton* against *The Creditors of Orbiston*.— Found, That a Service is needful, in case of Sums provided to Bairns in a Contract of Marriage. 26th July 1715, *Hugh Lyon* against *Gardin of Laton*.

SERVITUDE REAL.] A Tenement having a Servitude *Oneris ferendi* of Joists and laid-to Chimneys, upon another Tenement that was Ruinous; 'twas found, That the Proprietar of the Servient Tenement, who was taking it down in order to Rebuilding, must not only build the Wall in the Condition it was in formerly, for supporting both the said Joists and laid-to Chimneys; but also, that he must build

and lay-to the Chimneys, as they were before the taking down thereof, at his own Expences; and this, unless the Wall or Gavill was so ruinous, that the taking down thereof was necessary; in which Case it was found, That the Servient Tenement was bound to Expences of taking down, but not of putting up again. 24th June 1715, *Murray of Mount-Lothian*, against *Deacon Brownbill*. And 14th July 1715, *Inter eosdem*.

SHORT PRESCRIPTION.] A Person having been Alimented in a publick House, and his Representatives after his Decease being pursued for the same; 'twas found, That the 3 Years Prescription was not the 3 Years preceeding the Person's Death, but 3 Years before Citation. 23d June 1715, *James Forret*, against Representatives of *James Carstairs*.— Found, That it can take no Place in an Action of Compt and Reckoning against a Chamberlain, for such Years of his Intromissions, whereof his Accompts are not cleared; but that his Salaries for these Years may be allowed as Articles of the Discharge. 18th January 1715, *Relict and Children of Baillie Smith*, against *The Earl of Winton*.

SIDE-SCRIBING.] A Writ found Null, because not Side-scribed; it being granted after the Act of Parliament, Establishing the Custom of signing the Joinings. 18th December 1714, *Mackdonald* against *Mackdonald*.

SPUILZIE.] A Tenant having deserted his Possession at *Whitsunday*; but at *Harvest* having offered Payment of all Arrears under Form of Instrument, and required Liberty to cut down the Corns; the Master refusing, and causing reap and inbring them himself, was found liable in a Spuilzie. 14th June 1715, *Donald Dounie* against *Graham of Drynie*.

SUBSIDIARY ACTION.] A Decreet being recovered in a Subsidiary Action against Magistrates, for unwarrantably setting a Prisoner at Liberty; and the Party, after many Years, insisting against the then Magistrates, without calling the former or their Representatives, the Defenders were reponed to their Defences, and the Decreet turned into a Libel. 3d February 1715, *Henderson* against *The Magistrates of Jedburgh*.

SUBSTITUTION.] A Party taking a Bond payable to himself in Liferent, and his Daughter in Fie; and failing of her, to his Heirs whatsoever; found, That there being in this Case but one Substitution, the Succession upon the Death of the Daughter, should devolve not upon the Heirs, but upon the Executors of the Father. 3d February 1715, *Stevenson* and her Husband, against *Fifes*. *Vide* 19th February 1715.

SI SINE LIBERIS.] A Bond being only to subsist failing Children betwixt the Granter and his Wife, was found to be Void, by the existing of Children in the Marriage, who survived the Granter, but died before his Wife, without Issue. 16th February 1715, *Lord Royston* and *Frazerdale*, against *Halyburton of Pitcur*.

SUPERIOR.] In a Reduction and Improbation, a Superior found only obliged to call his Vassal or Representatives, and those in Possession; but not bound to call the Adjudger of

the Vassals or Sub-Vassals, whose Adjudication was after the Citation in the Improbation. 22d February 1715, *Thomas Spence* against *Sir Adam Whitford*.

T.

TACK.] A Tenant having a long Tack, containing an Obligation to reiterate the same as often as needful, in a Competition with a singular Successor of the Heritor, the Tackman was preferred to the Mails and Duties for By-gones, and in Time coming, till Removing, reserving all the Defences in the Removing, as accords. 16th February 1715, *Chrmichael* against *Lockhart*.— The Tack-duty of a Coal being agreed to be regulated by the Number of the Coal-hewers, 'twas found, That the Tackman was not liberate from the Duty, altho' he employ'd no Coal-hewers at all. 5th July 1715, *Cuningbam* against *Millar*.

TAILLIE.] A Father and a Son, who were both Infeft, having jointly Taillied the Estate in the Son's Contract of Marriage, with Clauses Irritant and Resolutive; 'twas found, That after the Father's Decease, the Son could not alter the Taillie, even tho' the Substitutes had been gratuitous. 15th July 1715, *Schaw* and her Husband against *Sir John Schaw*.

TESTAMENT.] A Testament made in Ireland, and only the *Probat* produced here, bearing the Testament to have been subscribed before 3 Witnesses, whereof 2 were Women, one of whom subscribes by initial Letters only; the Testament was nevertheless sustained as a sufficient Title in a Process, the User thereof confirming before Extract. 21st January 1715, *Wardlaw* against *Maxwells*.

TIERCE.] Found, That an Adjudication, with a Charge against the Superiors, excludes the Tierce. 28th January 1715, *Creditors of Hunter* against *Douglafs*.— A Relict insisting for her Tierce, and the Fiar alledging that the Estate was Taillied, excluding Tierce, Courtesy, &c. the Defence was repelled, because, tho' the Maker of the Taillie his Infeftment was Registrate, yet the Taillie it self was not Registrate in the particular Books appointed for Registration of Taillies. 26th July 1715, *Mrs. Jean Anderson* against *Wishart of Logie*.

TRANSFERENCE.] One of the Creditors in a Ranking deceasing, and the Decreet of Ranking being thereafter Extracted, without calling his Heirs; found, That the same could not have the Effect of a *Res judicata* against him. 16th June 1715, *Nisbet of Dean* against *Watson of Saughton*.

TRUST.] There being a Society of Merchants in relation to a Cargo of Timber, and a Bill given for a Part of the Price of that Cargo; found, That it did not fall under the Act of Parliament 1695, anent *Trusts*, but under the Exception thereof. 2d December 1714, *Jackson* against *Monroes*: And therefore, the Trust allowed to be proven otherwise than is prescribed in that Act. *Eodem Die*, *Inter eosdem*.— An Assignment in Trust, bearing to Heirs and Donatars, was sustained, when founded on by the first Trustee's Assigney, or the said Assigney's Heir,

Heir, tho' it was objected, That Trust was Personal, and not Assignable, nor *in bonis defuncti*; and tho' the Person on whom the Trust was now devolved, was a Romanist. 9th Febr. 1715, *Gordon* against *Gordon*.— Found, That a Person getting a Disposition to Lands upon Trust, in order to Sell the same, and pay himself of what was Resting him by the Granter, and not Introuetting with the Rents of the Lands for several Years, was not liable for the Rents, unless it were instructed he entered to the Possession. 8th June 1715, *Isabel Anderson* against *Corbet of Hardgray*.

TUTORS.] A Nomination, bearing to the major Part of such as should accept, and all save one, declining the Office of Curatory after the Tutorship was expired, the Office was not found to subsist in that one Acceptor's Person. February 1715, Viscount of *Primrose*, against The Earl of *Roseberry*.

V.

VALUE RECEIVED.] Found, That Indorsation of a Bill presumes *Value received*, and cannot be taken off but by a contrary Probation. 11th February 1715, *Auchinleck* against *Millar*.

W.

WADSET.] See *Comprising*.
WARRANTICE.] See *Contravention*.

WITNESS.] One of two Witnesses in a Writ found not sufficiently Designed, (and therefore the Writ Null) because the Designation did run thus, *Titius Insester of the Sam*, and *Mævius Servitor to Sempronius*: Tho' it was offered to be Proven, that both were *Sempronius* his Servitors. 9th November 1714, *Halden of Lanerk*, against *Ker of Clavers*.

ACT of SEDERUNT, Anent Abbreviates of Adjudications.

At Edinburgh, the 18th of January, One Thousand
Seven Hundred and Fifteen Years,

THE Lords of Council and Session, considering, That by the 24th Article of the Regulations 1695. It is Provided, That there shall be Abbreviats made of Decrets of Adjudication, and that the same be signed by the Pronouncer of the Decreet, and that the said Abbreviat be given in to be Recorded within Sixty Days after the Date of the Decreet; which by the 3d Article of the subsequent additional Regulations, is extended to Adjudications in Decrets *Cognitionis Causa*. In Pursuance of which Articles of Regulation, Adjudgers have been in use to take up the principal Abbreviat after Recording, and not to leave the same in the Hands of the Clerks of Allowances of Adjudications, to be Warrants of second Extracts, and that thereupon Questions may arise as to the Validity of a second Extract taken from the Record of Allowances, the said Record not being signed by the Judge Pronouncer of the Decreet of Adjudication, whereby a great Prejudice may happen to Parties, when partial Rights of the Adjudication are conveyed to several Parties; or the principal Abbreviat is lost: For Remedy whereof, the

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faids

said Lords of Council and Session, do ENACT and ORDAIN, That in Time coming, a principal Abbreviat, signed by the Judge Pronouncer of the Decreet of Adjudication, in Manner prescribed by the saids Articles of Regulation, when given in to the Clerk of the Bills to be Recorded, shall be retained by the said Clerk to be the Warrant of any *posterior* Extract, and for the Adjudgers farther Satisfaction and Security; It is hereby Enacted, That the Judge Pronouncer of the Decreet, shall sign two or more Abbreviates, as the Party shall desire, that the Adjudger may also have one or more principal Abbreviates in his Custody: And if any Adjudger since the said Articles of Regulation, think the principal Abbreviat more securely lodged in the Hands of the Clerk of the Bills; it shall be lawful for such Adjudgers to give in their saids Abbreviates to the Clerks of the Bills, who shall mark upon the Margin of the Register, where the said Abbreviat stands Recorded, the Name of the Ingiver, and the Time of the giving in thereof, and the Ingiver to sign the same. And that the Clerk do give Extracts of the said principal Warrants, as they shall be called for, the Parties paying the Half of the Dues, without paying Drink money for the Extracts, as is provided by the saids Articles of Regulation to be paid for taking in the Principals: And appoints thir Presents to be Printed, and Copies thereof affixed at the Great Door of the Parliament House, and other usual Places, that none pretend Ignorance. Extracted from the Books of Sederunt, by

J O. M'KENZIE.

ACT of SEDERUNT,

For the better and further Regulating of *Processes*,
carried on before the Lords of Session,

At Edinburgh, the 18th of February, One Thousand
Seven Hundred and Fifteen Years.

FOR the greater Dispatch of Business, and the better fixing and ascertaining the Diets of Hearing and Advising of Causes, and that Litigiousness may be the more effectually restrained; The Lords of Council and Session, Enact and Ordain, *imo.* That on *Thursday* Afternoon, Bills without Answers only be put into their Boxes, and that such Bills only be Advised on *Friday* Forenoon; except Bills and Answers, which the said Lords shall at any Time specially appoint to be Advised on *Friday* Forenoon, or Bills and Answers, which having been in their Boxes that same Week, remain nevertheless unadvised; which Bills and Answers so excepted, may be put into their Boxes on *Thursday* Afternoon, to be Advised on *Friday* Forenoon as formerly: And that no Causes which have been debated in the Inner or Outer-House be Reported to the said
Lords

Lords on *Friday* Forenoon, except by their particular Appointment, and that Informations in such Cases only be put in their Boxes on *Thursday* Afternoon. 2do. That on *Friday* Forenoon the Ordinaries (except the Ordinary of the Outer-House for the Week) shall not go to the Fore-Bar nor Side-Bar, nor to the Bills, but shall assist at the Advising of such Causes *in Presentia*, (and others aftermentioned) as for their Importance have been ordained to be so Advised on the said Day, and after such Procedure, as shall be Requisite, has been made in these Causes, or if there do not then happen any such Causes to be Determined, that these Bills and Answers shall be Advised, which having been given in that same Week, remain notwithstanding Unadvised; And next, Bills without Answers shall be Advised; And thereafter the Roll appointed for that Day by former Regulations shall be called. And in Consequence of the Premises, the said Lords Ordain, That the Hour from Nine to Ten for the Fore-Bar, and the Hours from Ten till Twelve for the Side-Bar, on *Friday* Forenoon, be left out of the Weekly Roll of Ordinaries; and that the Ordinary on the Bills shall in place of *Friday* Forenoon, perform that Service on *Friday* Afternoon, at Three of the Clock in the Session-House.

3tio. That *Saturday* be wholly Employed in Discussing the Rolls of such Causes as are proper to be called on that Day; And therefore that no Bills, except such as pass of Course, or Bills on Extraordinary Emergents be Advised on *Saturday*, or put in to their Boxes on *Friday* Afternoon, and that *Saturday* be not Reckoned henceforth in the Number of the Days, within which only it is allowed by former Regulations, to Reclaim by Bills to the Lords: *Providing always*, That nothing contained in this, or the Two Preceding Articles take place on any *Friday* or *Saturday*, which shall happen to be among the last five *Sederunt* Days of any Session.

4to. That against an Interlocutor Condemning in, or Assoilzieing from Expences, if Pronounced by an Ordinary, only one Reclaiming Bill shall be allowed; And if Pronounced by the Lords in Presence, no Reclaiming Bill shall at all be allowed.

5to. When a Cause in any Roll whatsoever, shall be called in the *Inner-House*, and the Debate begun, That no other be called, till the said Debate be ended; but if a Cause has been Called, and after some Debate continued, that the said Cause be again Called according to former Regulations; and notwithstanding of the Premises, That none but Causes as are proper for *Saturday* be called or debated on that Day; but that a Debate in such a Cause, once begun, shall be carried on, and Finished on any Day; and if a Debate on a Cause in the ordinary Action Roll, or in the President's Hand Roll, and a Debate on a Cause in the *Saturday* Roll happen both to remain Unfinished, and therefore shall both of them, according to the Premises be further debated on the next Day, (not being *Saturday*) in that Case the said Lords Ordain, That the Debate which was first begun, be first ended, and after it, that the other Debate be ended, before any other Cause shall be Debated.

6to. That after the first of *June* next, any Party against whom any matter of Fact shall be alledged, which might be admitted to Probation, the said Party or his Advocate, shall be obliged to *Confess* or *Deny* that

Fact before pronouncing of the Interlocutor; which Confession or *Denyal* respectively, shall be expressly marked in the Minutes; and if he do refuse so to Confess or Deny, his Refusing shall in like Manner be marked in the Minutes, whereupon he shall be held as Confest. And if he so Deny, what shall afterwards by the Probation appear to have been known to him, the said Party shall be obliged to pay all the Expences, without any Modification, which the Party has been put to through his Calumnious Denyal,

7^{mo}. That in all Decrets to be Extracted hereafter, if the Facts therein founded on, in order to infer any alledged Relevancy, be not by the Party concerned expressly denied, the same shall be held as acknowledged; and there shall not afterwards be Place to object for any Effect whatsoever, That the said Facts want Probation.

8^{vo}. That no Prorogations after extracted Acts shall hereafter be granted, without Expences to be Modified for the Parties Damage, and paid before the Party have the Benefite of the Prorogation, but upon weighty Reasons, or unforeseen Accidents sufficiently Verified. And Ordain these Presents to be Printed and Published. *Extracted from the Books of Sederunt, by*



JO. M'KENZIE.

F I N I S.



E R R A T A

PAGE 24. line 41. read *maritalis*. p. 44. l. 18. dele *printed*. p. 51. l. 36. r. *Restriction*. p. 55. l. 9. for *at* r. *with*. p. 56. l. 6. r. *Cultura*. p. 63. l. penult. r. *Charger*. p. 113. l. 6. r. *Sequester*. p. 116. l. 18. r. *sordidiores*. Ibid. l. penult. r. *mercibus*. p. 117. l. 41. r. *mercibus*. p. 139. l. 7. r. *Privilegia*. Ibid. r. *much*. p. 146. l. 5, 10, 11. r. *reficere*. p. 150. l. 22. r. *Obligations*. Ibid. l. 23. r. *Destinations*. p. 152. l. 32. r. *Prerogative*.

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